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MESSAGES

The Rt. Hon. M. R. Jayakar, *P.C., Bombay.*

Sir Maurice Gwyer, *K. C. B., K.C.S.I., Chief Justice of India, Delhi.*

Sir S. M. Sulaiman, *Judge, Federal Court, New Delhi.*

Sir S. Varadachariar, *Judge, Federal Court, New Delhi.*

Sir Lionel Leach, *Chief Justice, High Court, Madras.*

Sir Sidney Burn, *Judge, High Court, Madras.*

Mr. Vere Mockett, *Judge, High Court, Madras.*

Mr. A. J. King, *Judge, High Court, Madras.*

Mr. S. Wadsworth, *Judge, High Court, Madras.*

Mr. P. Venkataramana Rao, *Judge, High Court, Madras.*

Mr. F. W. Gentle, *Judge, High Court, Madras.*

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MESSRS RATANLAL AND DHIRAJLAL, *Editors, The Bombay Law Reporter, Bombay.*

MR. V. V. CHITALEY, *B.A., LL.B., Editor, All India Reporter, Nagpur.*

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MESSAGES

(From the Right Hon'ble M. R. Jayakar, P.C.)

Bombay,
September 25, 1940.

Dear Sirs,

I received your letter on my reaching India a few days ago. May I tender you my congratulations on the Madras Law Journal completing 50 years of its useful work in the legal world on the 1st of January, 1941? During this long period it has done excellent work, as all students of law who have had occasion to read your journal will gladly testify. I wish your journal all success.

Yours faithfully,
(*Sd.*) M. R. JAYAKAR.

(From The Hon'ble Sir Maurice Gwyer, K.C.B., K.C.S.I., Chief Justice of India.)

New Delhi,
September 11, 1940.

The "Madras Law Journal" is as well-known outside the Presidency as within it, and its Golden Jubilee is a notable event in the annals of the profession. The Federal Court is proud to be associated with it in the person of Mr. Justice Varadachariar, and I am sure that I am voicing the opinion of the profession in Northern India when I wish that the Journal may enjoy long life and prosperity and may continue to maintain that high standard of legal journalism for which it has always been known.

(*Sd.*) MAURICE GWYER.

(*From The Hon'ble Sir S. M. Sulaiman, Judge, Federal Court.*)

8, York Road,
New Delhi,
December 10, 1940.

Dear Mr. Narayanaswami Iyer,

Allow me to offer my heartiest felicitations on the occasion of the coming Golden Jubilee Celebrations of the Madras Law Journal, which occupies a high position among the legal journals in India. Its long record of good work and useful service does not stand in need of any mention. The reputation enjoyed by it for prompt reporting, accurate headnotes and care in printing testifies to the high efficiency of the Editorial Staff, with which many eminent lawyers have been associated in the past. Your Journal would be receiving expressions of goodwill from its numerous admirers; I join in the same and offer my best wishes for its continued prosperity.

Yours sincerely,
(*Sd.*) S. M. SULAIMAN.

(*From The Hon'ble Sir S. Varadachariar, Judge, Federal Court.*)

New Delhi.

It gives me great pleasure to convey to the Madras Law Journal my hearty felicitations on the occasion of its Golden Jubilee. In view of my long association with the conduct of the Journal till comparatively recent times, I find it embarrassing to say anything in appreciation of its work; but that very circumstance enables me to bear testimony to the constant endeavour of the Journal to maintain the high standard which its eminent founders had set for it. To the services which the Journal has rendered to the cause of legal studies and legal erudition, the messages that have been received from all quarters bear ample testimony. I wish and hope that the Madras Law Journal may in the years to come have an even more prosperous career with growing opportunities for useful service to the Bench, to the Bar and to the Public.

(*Sd.*) S. VARADACHARI.
27—12—'40.

(From The Hon'ble Sir Lionel Leach, Chief Justice, Madras High Court.)

Madras,
29th November, 1940.

Dear Mr. Narayanaswami Ayyar,

The Golden Jubilee of the *Madras Law Journal* is an event which certainly calls for celebration and I desire to offer to you and to all associated with its publication my heartiest congratulations. The standard of law reporting which the *Madras Law Journal* has maintained throughout its fifty years of existence has been high and both the Bench and the Bar are greatly indebted to its Editors and its Law Reporters. As a regular reader of the *Madras Law Journal* I have personal knowledge of the help which it gives to the profession, and I wish it all success in the future.

Yours sincerely,
(*Sd.*) LIONEL LEACH.

(From The Hon'ble Sir Sidney Burn, Judge, Madras High Court.)

Madras,
6th September, 1940.

Gentlemen,

I am very pleased to hear that the Law Journal will be fifty by the end of this year. It enjoys deservedly a very high reputation, due to the principles applied in the selection of cases for report, to the care applied in the preparation of the reports, and to the excellence of the paper and printing. I wish the Law Journal a long and even more prosperous career.

Yours faithfully,
(*Sd.*) SIDNEY BURN.

(From The Hon'ble Mr. Justice Mockett, Judge, Madras High Court.)

November 5, 1940.

Many congratulations to The Madras Law Journal on its Golden Jubilee.

I have been a subscriber to the Journal for 20 years and have always found its reports and articles of the greatest assistance.

The fact that the Madras Law Journal finds a place in the library of the Judicial Committee of The Privy Council (a fact

which came to my notice when I was in London) is a great tribute to the publication.

I wish the Journal, its Editor and Proprietor a long career of continued usefulness to the Legal Profession.

(*Sd.*) VERE MOCKETT.

(From The Hon'ble Mr. Justice King, Judge, Madras High Court.)

I extend my very hearty congratulations to the Madras Law Journal on the completion of the first fifty years of its existence, and hope it may long continue to occupy that unique position in the world of legal journalism which it has so successfully attained.

(*Sd.*) A. J. KING.
12*th October*, 1940.

(From The Hon'ble Mr. Justice Wadsworth, Judge, Madras High Court.)

Dear Sir,

Please accept my very hearty congratulations on the Jubilee of the Madras Law Journal. I hope that during the next half century your journal will add to its already high reputation.

Yours faithfully,
(*Sd.*) S. WADSWORTH.

(From The Hon'ble Mr. Justice Venkataramana Rao, Judge, Madras High Court.)

I send my heartiest congratulations to the Madras Law Journal on the occasion of the celebration of its Golden Jubilee. It was started in 1891 by a combination of four brilliant lawyers, three of whom subsequently adorned the High Court Bench, at a time when law reporting was in its infancy in this Presidency, nay, in all India and the only legal journal that was then being published was the Indian Jurist. It was a timely venture conceived in the best interests of the profession and time has shown that it has contributed not a little to the shaping and development of Indian Law. In their preface to the first volume of the Journal the learned Editors expressed themselves as follows:

"In addition to giving our own reports of the decisions of the High Courts in Madras and other places, we hope to place before our readers translations of various Hindu Law Books,

which remain yet untranslated, in so far as they have bearing on questions which practically arise for decision every day in our Courts of Justice. We propose further from time to time, to place side by side the conflicting decisions of the various Courts in India on the same point in the hope that such procedure will enable the Courts to act in greater harmony than they do at present in the interpretation of acts and enunciation of general principles of law and when this is not possible, to enable the Legislature to bring about such harmony by removing the ambiguities which may have given rise to such discordant views." The journal did in a considerable measure fulfil this ideal. The journal suffered under many handicaps in the early stages of its progress but the energy, enthusiasm, and courage of the Editors who were then in charge enabled them to surmount the obstacles and place it on a stable and secure basis. Some of the earlier volumes of the journal furnish refreshing and instructive reading. The criticism of the judgments and legal measures were marked by a depth of learning, clarity of thought, accuracy of statement of legal principles and fearless and outspoken expression of views. The Editors were fully alive to their duty as responsible Editors of a Law Journal and were not influenced by any extraneous considerations in their task of criticism. They never hesitated to say what they felt. For instance dealing with the refusal of the then Chief Justice (1892) apparently with the assent of the other Judges, of permission, to have access to the judgments of Court for the purpose of publication, the Editors remarked as follows:

"This surprised us not a little as we could not but remember how much England was indebted to private enterprise for the publication of those valuable series of reports to which the healthy development of the law of England is so much due. We could not on any hypothesis, account for the strange conduct of the Judges. A Judge who has so much diffidence as to be afraid to permit his judgments to receive the light of public discussion cannot expect to command confidence as a dispenser of justice. A wrong decision which is carefully criticised loses much of its power for mischief .... It would give us no pleasure to be persistently vilifying any body of persons and especially a body for whom we have nothing but respect, though we occasionally disapprove of their acts and decisions."

What a change has come in the last fifty years! The facilities afforded for reporting are such that there are more than three journals reporting cases decided by the Madras High Court.

Only, well directed effort has now become necessary on the part of the journals to utilise the said facilities in the best manner and to the best advantage possible.

One of the legitimate functions of a law journal is to offer sane and judicious criticism of all matters which pertain to law and to provoke thought and stimulate discussion and bring about a healthy tone in the development and administration of law and justice. In no field of human activity is freedom of thought and discussion so essential as in the field of law because law acts and reacts on every phase of human conduct and behaviour.

As pointed out by me in my message to the Law Weekly in 1939 on the occasion of its Silver Jubilee, a law journal ought to fulfil in the region of law and justice the role which the Public Press is expected to do in matters general. In the complex conditions of modern life and society the importance of Press as the bulwark of freedom is beginning to be increasingly felt and the influence a law journal can exert in the making of a new India particularly in the field of constitutional reform cannot be too highly estimated. I trust every law journal in this country will awake to this sense of duty to the public which is imperatively cast on them.

I wish the Journal continued success and prosperity in its career of usefulness to the Bar, the Bench and the country.

Madras,

28th Dec. '40. (*Sd.*) P. VENKATARAMANA RAO.

(From The Hon'ble Mr. Justice Gentle, Judge, Madras High Court.)

30th September, 1940.

Dear Sirs,

I desire to express to the Madras Law Journal my congratulations upon its attaining its Golden Jubilee, and best wishes for its continued success and prosperity.

It was the pioneer of Indian non-official legal publications. Many others have since sought to emulate it; none has advanced beyond its high standard of efficiency and usefulness.

Its independence, which has at all times been maintained, its reliability for accurate reporting, and its indispensability to all

who are engaged in the administration of justice, are exemplified by the words "*fortunae majoris honos, erectus et acer*".

Yours faithfully,
(*Sd.*) F. W. GENTLE.

(*From The Hon'ble Sir Abdur Rahman, Judge, Madras High Court.*)

25th November, 1940.

The Madras Law Journal adorned the library of an humble practitioner like myself for many years before I could even dream of coming from the north to this part of the country in the present capacity. It proved to be of invaluable assistance to me in carrying my work then as it does in discharging my duties now. Since the value of a Law Journal consists in its wise and careful selection of decisions, the constitution of an Editorial Committee, consisting as it did and does of eminent and leading members of the Madras Bar, inspired a great deal of confidence in the minds of its subscribers and continues so to do in respect of the discriminate choice of its material. I hope that this arduous duty will continue to be performed, as has always been done, regardless of any extraneous considerations and that the Journal will continue to enjoy its reputation in this, as it does, in being a leading Journal of this Presidency. I offer my congratulations on this occasion for the past and good wishes for its continued success in the future.

(*Sd.*) A. RAHMAN.

(*From The Hon'ble Mr. Justice Horwill, Judge, Madras High Court.*)

November 11, 1940.

Gentlemen,

May I offer you my congratulations on the accomplishment of fifty years of brilliant and faithful service to law and justice.

You may justly be proud of the high standards that have been reached by those connected with the M.L.J., during this period. It is not easy to make a weekly law journal conform with the high ideal you set out in the covers of your journal; and it is a high tribute to the ability, acumen, devotion and faithfulness of all who have been and are connected with the journal that you have been able to do so.

Yours faithfully,
(*Sd.*) L. C. HORWILL.

(From The Hon'ble Mr. Justice Biswas, Judge, Calcutta High Court.)

13th November, 1940.

On the occasion of the Golden Jubilee of the Madras Law Journal I send it my warmest good wishes. By its constant endeavour to maintain the best traditions of law reporting, it has established for itself a position second to none in the legal world, and set a standard of all-round excellence of which it can be legitimately proud. Apart from the reports of cases which show a wise discrimination in their selection, the notes and commentaries on legal topics which are a distinctive feature of the Journal easily place it in the front rank of such publications. May its future be fully worthy of its past.

(*Sd.*) C. C. BISWAS.

(From The Hon'ble Mr. Justice Tek Chand, Judge, Lahore High Court.)

2nd September, 1940.

Dear Sir,

I am glad to learn that the "Madras Law Journal" will be celebrating its Golden Jubilee in January, 1941. I congratulate the management on the success, which the Journal has attained, and the high standard, which it has uniformly maintained throughout this long period. I have been a constant reader of the Journal for more than thirty years and have never regretted the time spent in going through the reports as well as the "Articles on Legal Topics" and "Critical Notes on Leading Cases", which I have invariably found to be instructive and illuminating.

Yours faithfully,
(*Sd.*) TEK CHAND.

(From Sir C. E. Odgers, Retired Judge, Madras High Court.)

October 27th 1940.

Dear Sir,

Some days ago I was delighted to receive a letter signed by my old friends, T. R. Venkatarama Sastri, T. M. Krishnaswami Aiyar and K. V. Krishnaswami Aiyar. These distinguished names recalled many others—old students of mine at the Law College, now in the front rank at the Madras Bar or on

the Bench, such as Sir Alladi Krishnaswami (of the same year at the Law College as the two on your Editorial Committee), Mr. B. Sitarama Rao, Mr. Justice Somayya, Mr. Justice K. S. Krishnaswami Aiyangar, Mr. Justice Lakshmana Rao and many others. I am glad to learn that your journal is about to celebrate fifty years of its most useful existence. I have been constantly referring to it for the last 38 years and for the last 20 it has been my guide in many a difficult case. For the last eleven years I may say that I have read it week by week from cover to cover. The reports are clear and accurate and I now rely upon it very largely to keep me up to date in the decisions on Hindu and Muhammadan law, subjects, in which I still examine for the University of London. I find the notes on the English Law Reports also very useful. They often remind one of cases one may have missed in the official reports. In short, I consider your Journal to be one of the most useful of its kind, not only to those in active practice in India but also to those of us who still retain an abiding interest in the Indian Courts and the administration of the law in India and especially in Madras. My very sincere good wishes to the Madras Law Journal on its fifty years of life and my hope for another long spell of usefulness and prosperity.

Yours sincerely,
(*Sd.*) CHARLES ODGERS.

1, Brick Court,
The Temple, London, E.C. 4.

(*From Sir David Devadoss, Retired Judge, Madras High Court.*)

Madras,
15*th October*, 1940.

The late Mr. V. Kalyanarama Iyer, Bookseller, asked me to subscribe to the Madras Law Journal in 1891 when I was only an Apprentice-at-law. From that time I was a subscriber till 1933. One special feature of the Journal was the short critical notes of cases which were very informing. Till about 1908, if my recollection is right, the Madras volumes of the I.L.R., Series did not report many decisions which ought to have been reported; and the Madras Law Journal in a large measure supplied the omission. I have always found the Madras Law Jour-

nal keeping up its reputation for accurate reporting and correct head notes. The Bench and the Bar always appreciated the excellent work done by the Editors of the Journal.

I wish the Madras Law Journal long life and continued prosperity.

Yours sincerely,

(*Sd.*) DAVID DEVADOSS.

(*From Sir M. Venkatasubba Rao, Retired Judge, Madras High Court.*)

Hyderabad-Deccan,

10th December, 1940.

The Madras Law Journal may well be proud of its long record of meritorious service. Its many features have made it invaluable to the legal profession—its accurate and able reporting, suggestive articles, stimulating critical notes and a wide variety of "jottings and cuttings". Its promise in its first issue in 1891 "to save decisions (which the Official Law Reporter could not report) from becoming food to white ants", it has more than fulfilled. It has throughout maintained a high standard of excellence and efficiency and to-day it is among the foremost legal journals in the country. When on the Bench, I consulted it more often than any other single journal. On this auspicious occasion of its Golden Jubilee, I offer it my good wishes and pay a tribute to Mr. R. Narayanaswami Iyer whose unfailing courtesy as much as his devotion to this journal, his numerous friends so much admire.

(*Sd.*) M. VENKATASUBBA RAO.

(*From Sir Gilbert Jackson, Retired Judge, Madras High Court.*)

7, Gainsborough Gardens,
Well Walk,
Hampstead,
N.W. 3.

Dear Sirs,

The M.L.J. in Roman numerals is not the 50 years' journal, but the thousand fifty years' journal—surely a good omen

for its future! That it has flourished so well for this first fifty years of its existence you have my heartiest congratulations.

Yours sincerely,
(*Sd.*) G. H. B. JACKSON.
17th October, 1940.

(*From Sir H. D. C. Reilly, Chief Justice, Mysore High Court.*)

17th October, 1940.
Bangalore.

I have been a reader of the Madras Law Journal for nearly 35 years. Throughout that period I have found not only its reports but also its Articles and in particular its Notes on Indian Cases of great assistance. For half a century it has maintained its high standard under a succession of eminent editors. May it continue for many half-centuries its distinguished service to the study and practice of law in India,

(*Sd.*) D' ARCY REILLY.
21st December, 1940.

(*From Rao Bahadur Sir C. V. Anantakrishna Ayyar, Retired Judge, Madras High Court.*)

Chittur-Cochin,
14—12—1940.

I have great pleasure in sending this message of goodwill, on the occasion of the Golden Jubilee Celebrations of the Madras Law Journal.

I have followed The Madras Law Journal very carefully from 1898. It was useful from its very beginning, but it grew in its usefulness enormously later on. Its criticisms on reported decisions of Courts have always been sober and dignified, and have been appreciated even by the Judges concerned. Its extracts from foreign journals have always been a leading feature of this journal, and are always looked to by the readers as they enable them to keep themselves up to date on foreign legal and connected matters. The decisions are reported early and great care is taken in framing the Head notes. The journal has no predelictions for any particular class of people or cases, but reports all decisions of general public interest. Its printing and get-up have been excellent, and it is a pleasure to read the M.L.J.

It was said of a leading Newspaper of Madras that its readers found difficulty in filling up the time on days when there was no issue of the Paper; similarly, it can be truly said of the Madras Law Journal that if for any reason the same be not published for a period, its readers will feel its absence; and what is more, feel that they are not up to date, not only regarding Indian law, but Foreign law also; for, by reading the M.L.J. regularly, one feels that one is abreast of the Legal World, and is thankful to the journal for the solid service it renders to its readers. 50 years is no short period regarding Indian journals, and the M.L.J. may well be proud of its achievement. It has always been fortunate in securing able and sincere workers; in fact, the leading legal lights of Madras have always willingly co-operated in the work of the journal and in making it a success. It has achieved a status, and a very respectable status; it is full of life and vigour, and has a good future before it. I wish the Madras Law Journal a long life of luck and usefulness.

(*Sd.*) C. V. ANANTAKRISHNA AYYAR.

(*From F. B. Tyabji, Esq., Formerly Judge, Madras High Court.*)

Bombay,
18*th September*, 1940.

Dear Mr. Venkatarama Sastri,

* * * * * *

I have always had a special regard to your journal not only for its over standard of excellence but because of my coming into such pleasant contact with it when I was in Madras. I am as happy to be remembered by you—as I learnt when you were in Bombay some time ago—you had not forgotten me. I think I know your colleagues too, though I confess their personalities are not as clearly before my mind as yours—for one thing the Krishnaswamis were numerous in my time.

I must not run away from the object of this letter, which is to congratulate you on the Jubilee and to wish to the M.L.J as distinguished and even more successful a future, as it has had in the past. I did not know that yours was really the earliest of the Law Journals in India. I think such journals have a very useful and imporant function to perform; and I believe that the M.L.J. has been performing its part much better than many of its colleagues. You certainly have had a most distinguished body of sponsors and editors.

I wish you every success.

* * * * * *

Yours sincerely,
(*Sd.*) FAIZ B. TYABJI.

(From Sir Lal Gopal Mukerji, Late Judge, High Court, Allahabad and President of the Board of Judicial Advisers, Jummu and Kashmir State.)

The amount of useful work The Madras Law Journal has done in the Indian Legal world cannot be over-estimated. It has a strong Editorial Committee and they have done every thing to make the publication not only useful but also a constant source of enlightenment on all legal matters requiring elucidation and of interest.

On this occasion of the celebration of the Golden Jubilee of its useful existence, I wish the Journal a long and useful career.

23, Thornhill Road,
Allahabad.
November 13, 1940.

(*Sd.*) LAL GOPAL MUKERJI,

(From The Right Hon'ble Sir Tej Bahadur Sapru, P.C., K.C.S.I.)

19, Albert Road,
Allahabad,
31*st August*, 1940.

Dear Sir,

* * * * * * I am glad to hear that the Madras Law Journal will soon be completing 50 years of its life. I desire to convey to you my very sincere appreciation of your Journal. I have been a reader of it for a very long time and I have found its reporting and editorial notes to be most excellent. I wish it continued success and prosperity.

Yours sincerely,
(*Sd.*) TEJ BAHADUR SAPRU.

(From Sachivottama Sir C. P. Ramaswami Aiyar, K.C.S.I., K.C.I.E., Dewan of Travancore.)

(Camp) Madras,
21st December, 1940.

The Madras Law Journal is one of the oldest as it is certainly one of the most instructive and comprehensive of Indian Legal Journals. It is also noteworthy that unlike many other institutions, it has throughout maintained the very high level established from its inception by some of the foremost lawyers of the Presidency who were responsible for its start. Not only by its careful and discriminating reports but also by the refreshing candour of its criticisms, it has performed a most useful function. I wish it many years of usefulness and prosperity.

(*Sd.*) C. P. RAMASWAMI AIYER.

(From Sir B. L. Mitter, K.C.S.I., Advocate-General of India.)

New Delhi,
November 9, 1940.

The Golden Jubilee of the Madras Law Journal is a proud event in the legal world of India. The Journal has had a distinguished and honourable career and I hope it will long continue to render valuable service to the profession. As one aware of the difficulties and limitations of an independent professional journal in India, I offer my warm felicitations on this auspicious occasion with right goodwill.

(*Sd.*) B. L. MITTER.

(From Sir A. K. Roy, Advocate-General, Bengal.)

Calcutta,
November 22, 1940.

Dear Sir,

* * * * * * It gives me very great pleasure to convey to The Madras Law Journal my sincere felicitations on the attainment of its Golden Jubilee. The excellent work it has done for the last fifty years for the benefit and advantage of generations of Lawyers furnishes a record of achievement of which it can well be proud. I wish the Journal

long continuance of its beneficent career and all prosperity in the years to come.

Yours truly,
(*Sd.*) ASOKA K. ROY.

(*From N. P. Asthana, Esq., Advocate-General, United Provinces.*)

Allahabad,
3rd September, 1940.

Dear Sirs,

* * * * * *

The Madras Law Journal has established a unique record in the annals of legal Magazines in this country. Its editorial chair has been occupied by very prominent lawyers and the illuminating articles which it has published on difficult and knotty questions of law have been of immense help to the lawyers of the country. The reports of cases have always been carefully selected and the arguments of the counsel which have been reproduced have rendered those reports most useful. I have been one of the admirers of the Madras Law Journal and personally speaking have derived much benefit from it.

I congratulate the Editors of the Journal upon the long record and wish it an even longer life to the benefit of the profession.

Yours sincerely,
(*Sd.*) N. P. ASTHANA.

(*From S. M. Bose, Esq., Barrister-at-Law.*)

22, Ballygunge Circular Road,
Calcutta,
16—11—1940.

Dear Sirs,

Please accept my congratulations for the Golden Jubilee of your journal noted for the excellence of its report which occupies the foremost place in the legal literature of the land.

Yours faithfully,
(*Sd.*) S. M. BOSE.

(*From Dr. K.N. Katju, M.A., LL.D., Advocate, High Court, Allahabad.*)

Allahabad,
5*th September,* 1940.

Dear Sirs,

As a member of the Bar and also as the Editor of the Allahabad Law Journal, I have had the fullest opportunity to acquaint myself with the high position which the Madras Law Journal occupies in the legal world in India, and I am only voicing the opinion of the profession in hoping that its career of useful service to the profession will continue for many many years to come.

Yours sincerely,
(*Sd.*) K. N. KATJU.

(*From Sir Hari Singh Gour, Advocate, Nagpur.*)

Chelsea, London, S.W. 3,
23*rd October,* 1940.

I have practised for nearly fifty years at the Bar of India, and have invariably read the leading and other articles published in the columns of the M.L.J. and quoted cases therefrom. I have always found it most useful in my practice and I have no doubt that the erudition and constructive criticism of its leading articles must have influenced the Judiciary in several cases. I heartily congratulate the proprietors on the completion of its fifty years of successful and useful life and hope that it will continue to enhance its reputation and live long to celebrate its centenary.

With kind regards.

Yours sincerely,
(*Sd.*) HARI SINGH GOUR.

(*From Rao Bahadur B. Sitarama Rao, Government Pleader, Madras.*)

My dear Editor,

I sincerely congratulate you on this occasion of the Golden Jubilee of your Journal with which I have been associated for over quarter of a century and wish you a long future of public

usefulness which, after all, is the true test by which all such undertakings as yours are to be tested. Your Journal has stood uniformly for the ideal of orderly progress and in your method of work, you have always striven to maintain a certain standard of propriety and efficiency. However great a strain upon your resources, the maintenance of those ideals and those standards might involve, I trust you will not depart from them. Adaptability to new environments is a necessary condition of life but the ideals and the qualities to which I have referred are not things with which there can be any compromise. Changing times might require more vigorous handling of problems and might also call for revision of old notions of the pace of progress. But still the progress should be orderly, should be circumspect and should be all round and consistent. A critical outlook of the lawyer combined with sound notions of progress of which I want your Journal to continue to be the exponent, has, I think, even a more important part to play in the future than the past.

(*Sd.*) B. SITARAMA RAO.

(*From Prabhas Ch. Mallik, Advocate, High Court, Government Pleader and Notary Public, Howrah.*)

Howrah,
14*th November*, 1940.

In all earnestness I take the opportunity to associate myself with the executive of the Madras Law Journal and send my message of goodwill on the occasion of its Golden Jubilee Celebration. Apart from the official reports this journal is one of the pioneer legal periodicals and has earned a reputation for itself always growing from year to year and is now at the full height of its glory. Not only the reporting is accurate and precise but the assortment and selection of cases are its special characteristics. In addition to the case-reports the journal portion teems with articles on interesting and important points of law and the dissertions therein are very illuminating, so much so that its value can never be fully appraised. This aspect of the journal justifies its existence as a true journal and is a continuing source of light to workers in the line. In truth the journal is a storehouse of legal knowledge and has literally become an institution in this country. I thoroughly appreciate the work of the stalwarts of the profession in the Editorial staff and the services which this journal has so long rendered

to the profession by catering legal knowledge in a lucid and fascinating manner. It has also fostered a powerful band of lawyers working with its encouraging patronage. I congratulate the committee of editors and wish long life and more success to this journal.

(*Sd.*) P. CH. MALLIK.

(*From S. Duraiswami Aiyar, Advocate.*)

The Asram,
Pondicherry,
5*th December,* 1940.

My dear Narayanaswami Iyer,

Hearty congratulations to yourself and the staff of the Madras Law Journal on the occasion of its Golden Jubilee. What a high standard it has consistently maintained and how excellent and useful it has been throughout!

My best wishes for its future and its future success, and may the profession have in the future, as in the past, a Madras Law Journal of which it can be proud.

Yours very sincerely,
(*Sd.*) S. DURAISWAMI.

(*From K. P. Khaitan, Esq., Barrister-at-Law, Calcutta.*)

Ballygunge, Calcutta.
3rd December, 1940.

The Madras Law Journal occupies a unique position in the current legal literature in India and I have reasons to know that it is also regularly referred to in other parts of the British Empire, where Indian law is accepted as a guide. Its wide range of subject-matter and its fine arrangement have made it not only a valuable repository of case law but also a mine of information on legal and general subjects containing also many a legal anecdote worth preserving. Its Golden Jubilee has fallen at a point of time when India like the rest of the world is on the threshold of big changes in every department of life. One can visualise that when juristic concepts and legal provisions will be in the melting pot and when radical changes in the political, economical and social life of India will bring

in their train innumerable changes in the law that will be administered as also the procedure that will be followed, a heavy strain will be put upon the Madras Law Journal to play its invaluable part in the legal world of to-morrow and I am convinced that the Madras Law Journal will rise to the occasion and its success will be at least as great in the future as it has been in the past.

(*Sd.*) K. P. KHAITAN.

(*From Dr. Jaikaran Nath Misra, M.A., LL.D., Barrister-at-Law, Lucknow.*)

Lucknow,
13*th September*, 1940.

My dear Sir,

* * * * * *

I heartily congratulate you and wish the Journal success and prosperity in the future which it has enjoyed in the past. As an old subscriber of the Journal I can certainly say that it merits a leading place in the Legal Publications of this country. The cases reported are select and instructive and one is proud to have a complete set of your Journal.

Yours sincerely,
(*Sd.*) J. N. MISRA.

(*From P. V. Kane, M.A., LL.M., Advocate, High Court, Bombay.*

Bombay 4,
10*th December*, 1940.

Dear Sir,

* * * * * * * * * * * I am very glad that the Golden Jubilee celebrations of the Madras Law Journal afford me an opportunity of expressing my sincere appreciation of the very good and sound work put in by the Madras Law Journal during half a century. The Madras Law Journal occupies the first place among private Law journals. It has many sides to its activity. It not only publishes the reports of cases, but contains very learned, acute and thoughtful articles on the intricacies of the Law; in the past your journal rendered great service to Hindu Law by translating important passages from standard Sanskrit works like the

Madavapatijata, the Parasara Madhaviya, Vaidyanatha Diksitya and others. Its jottings and cuttings are always interesting and instructive. I always look forward to its critical notes of cases, which display great legal acumen and fearlessness of spirit. Altogether I should say that yours is the best legal journal in India. I hope that in the years to come it will not only maintain the high position it has secured by hard work and intelligent handling, but will add fresh glory.

Yours sincerely,
(*Sd.*) P. V. KANE.

(From Mr. N. Chandrasekhara Aiyar, District Judge, Salem.)

The completion by the Madras Law Journal of 50 years of its existence is a happy event which deserves to be celebrated in a fitting manner. The journal has throughout its life maintained a high standard of excellence in the matter of law reporting, instructive criticism of cases and in balanced comments on events in the legal world. It has achieved well-deserved fame for quickness and accuracy in reporting, and discrimination in the selection of cases fit to be reported. Naturally, the journal has come to occupy a premier place among non-official legal periodicals in India; and its weight and authority are considerable with the Bench and the Bar.

* * * * * *

May the Madras Law Journal have many more years of useful existence, and may its further life be even brighter than its past.

(*Sd.*) N. CHANDRASEKHARA AIYAR.

(From Rajadharmaprasaktha A. R. Nageswara Iyer, Judge, High Court of Mysore.)

Shankarapuram,
26th November, 1940.

Heartiest congratulations to the Madras Law Journal on its attaining the age of fifty. Half a century's good work is a record of which any journal ought to be proud. It is needless to say that it has maintained a high standard of efficiency and has rendered very valuable help to the Judges as well as the Legal Profession. May it continue long in its career of usefulness!

(*Sd.*) A. R. NAGESWARA IYER.

(From Rao Bahadur Rajaneetinipuna A. Verghese, Chief Justice, High Court of Travancore.)

Trivandrum,
22nd November, 1940.

Dear Sir,

* * * * * *

"With the commencement of the coming New Year, the Madras Law Journal enters on the 51st year of its existence. That it has lived to celebrate its Golden Jubilee is sufficient proof of its virility and usefulness. It is edited well and has uniformly been maintaining a high standard of legal journalism and has been very useful to the Bench and the Bar. I wish the Journal continued prosperity and usefulness, and wider circulation."

I remain,
Yours faithfully,
(*Sd.*) A. VERGHESE.

(From Rao Bahadur P. Neelakanta Menon, M.A., Barrister-at-Law, Chief Justice, High Court of Cochin.)

Ernakulam,
8th November, 1940.

I congratulate the Madras Law Journal on the completion of its fifty years of useful work. The Journal has established an enviable reputation and has been of great assistance both to the Judges and the legal practitioners for several decades. The management have every reason to be proud of their achievements and I wish the journal all prosperity in the future.

(*Sd.*) P. NEELAKANTA MENON.

(From Rao Bahadur T. S. Narayana Ayyar, M.A.B.L., Judge, High Court of Cochin.)

Ernakulam,
17th December, 1940.

"I have much pleasure in sending my hearty felicitations to the management of the Madras Law Journal on the celebration of its Golden Jubilee. The Madras Law Journal has a tradition which is peculiarly its own. Fifty years of useful service in the cause of the legal profession is a record of which it can justly be proud."

(From Sir V. T. Krishnamachari, K.C.I.E., Dewan, Baroda State,)

Baroda,
11*th November,* 1940.

I am glad to send a message of goodwill on the occasion of the Golden Jubilee of the Madras Law Journal.

From the beginning the Journal has had the support of the best brains at the Madras Bar and its articles have always contained brilliant expositions of fundamental juristic conceptions instead of bare comments on case law to which many Law Journals are apt to confine themselves. Specially noteworthy are the services rendered by the Journal in the elucidation of the principles of Hindu Law.

I have no doubt that a reprint of the articles written in it by eminent jurists like Sir V. Bashyam Aiyangar, Mr. V. Krishnaswami Aiyar, Mr. P. R. Sundara Aiyar on subjects relating to Hindu Law will be read with much profit even in these days.

I wish the Journal many years of service to the country.

(*Sd.*) V. T. KRISHNAMACHARI.

(From Diwan Bahadur K. V. Brahma, C.I.E., M.B.E., President, State Executive Council, Sangli.)

Sangli (S.M.C.),
5*th September,* 1940.

Dear Sir,

* * * * * *

The Madras Law Journal has attained to the fame it has in the legal world solely on account of the fact that those who were and are in charge of it realized and continue to do so that success is only another name for unstinted labour and attention in what one undertakes to do or as "Bhagavat Geeta" puts it स्वकर्मणा तं अभ्यर्च्य सिद्धिं विन्दति मानवः "Man attains success only by worshipping Him through his actions" (not by water or flowers). So long as the Journal keeps this ideal of selfless devotion to duty it can count on its maintaining its reputation and its usefulness. I wish the Journal all success in the years to come.

Yours sincerely,
(*Sd.*) K. V. BRAHMA,

(*From The Principal, The Law College, Poona.*)

Poona, 18*th December*, 1940.

I send my hearty goodwill and sincere congratulations to the Editors of the Madras Law Journal on this occasion of its Golden Jubilee Celebration. From its very birth it had the rare good fortune of having the fostering care of stalwarts like the late Sir Sankaran Nair, V. Krishnaswami Aiyar, P. R. Sundara Aiyar, and the veteran Sir P. S. Sivaswami Aiyar whom we have the good fortune to have among us to give us his blessings and advice. The Madras Law Journal has always been a source of inspiration and instruction to the students of Law and its notes and editorial reviews have always evoked admiration and respect. I wish a long and ever developing prosperous career to the Journal.

(*Sd.*) J. R. GHARPURE.

(*From L. R. Sivasubramanian, Dean, Faculty of Law, Benares Hindu University.*)

I consider it at once a pleasure and a duty to send my hearty greetings to the Madras Law Journal on the occasion of its Golden Jubilee and also my sincerest good wishes for its continued excellence and success in the times to come.

* * * * * *

It occupies the same pre-eminent position in India as the Law Quarterly Review in England, the Juridical Review in Scotland and the Harward Law Review in America. It has set the tone of healthy criticism and examination of the decisions of the highest tribunals of this country, and it is this that gives it a peculiar value and makes it irreplaceable.

* * * * * *

It is my ardent hope that the future of the Madras Law Journal will even be greater. Amidst the titanic struggle now being staged in this world, we in this country, who are striving to establish national unity and freedom, have a great task before us to unify our laws, particularly in regard to marriage and succession, gifts and wills, and also to deal with a host of complicated questions relating to inter-state and inter-provincial problems. In resolving the many tangles that will arise in the course of this task and in helping to forge the new legal principles towards achieving the desired unity the part that the Law Teacher can play is immense. That the present editor is himself of the Law Teaching profession, as some of his illustrious

predecessors have been, is not a little encouraging to those who have taken wholly to the teaching side of the profession. To the Madras Law Journal then may we look for help and direction in the growth and formulation of a legal system which will not only embody what is truly representative of the high ideals of our country's culture and civilization but which will reflect the essential principles of justice and humanity. Long may the Madras Law Journal continue to prosper.

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(*Sd.*) L. R. SIVASUBRAMANIAN.

(From The Principal, Ripon Law College, Calcutta.)

Calcutta,

26th November, 1940.

Dear Sir,

I hasten to congratulate the Madras Law Journal on its having attained the age of fifty. It has amply fulfilled the purpose with which it set out, *viz.*, to rescue many weighty judgments from "that waste paper basket, if one may so call it—the record-room of the High Court". It was born in 1891 but contrary to all legal maxims, attained years of discretion from its very birth. It is a splendid publication as much for its store of legal information as for its brilliant articles—the "asides"—which are a constant source of genuine intellectual recreation for the overworked members of perhaps the most competitive of professions.

Yours very sincerely,
(*Sd.*) S. C. CHAUDHURI.

(From The Principal, University Law College, Dharbhanga Buildings, Calcutta.)

12th November, 1940.

As one of the oldest subscribers of the Madras Law Journal, we wish the Madras Law Journal many years of useful activity. It is a legal Journal which reports very important decisions of the Madras High Court with great clarity and precision. Our students and Professors in the past and in the

present have been greatly benefited by the study of the Madras Law Journal.

P. N.
(*Sd.*) ~~S. M.~~ BANERJEE,

(*From The Law Association, District Office Buildings, Bangalore City.*)

9th December, 1940.

Gentlemen,

On behalf of the Law Association, Bangalore, I tender to you my hearty congratulations on the occasion of the celebration of the Golden Jubilee of the Journal. Started by a band of earnest and learned lawyers and co-operated with, in succeeding years, by a number of distinguished members of the Madras Bar, your Journal has become one of the leading legal periodicals of India. It has earned a high reputation for its careful selection of the judgments which it reports, for its accuracy in reporting, for its learned articles and for its critical notes on the decisions of the Privy Council and of the High Courts and has thereby rendered signal service to the legal world. I wish the Journal everlasting life and continued success.

Yours sincerely,
(*Sd,*) C. LAKSHMANA GOUDU,
President.

[*From R. N. Aiyangar, Esq., Barrister-at-Law, Editor, Indian Law Reports, (Madras Series.)*]

24th October, 1940.

Recently the Lord Chancellor of England informed the Incorporated Council of Law Reporting that their work is of ***National Importance***. That has always been so in time of peace; that is equally so, as observed, even now in time of war. The Supremacy of the Law has to be maintained and upheld at all times and in all countries. The work, therefore, of Law Reporting which embodies, and thereby helps to preserve, the law as expounded judicially is indeed of the greatest importance in all civilised communities. I consider the Law Reports of any country to be the true and unfailing index of its culture and civilisation. The Law Reports mark the place which the country occupies and the stage which it has attained in the evolutionary process of its life and thought. Law Reporting in

England, and equally in India, has set for itself very high ideals and slowly but surely has built up a noble tradition. The careful sifting and selection out of an ever-increasing volume of decided cases; the precision and sufficiency of the head-noting; the accuracy and completeness of the reporting; the neatness and expedition with which the cases are published all contribute to make for the success of a Law Journal. The Madras Law Journal started fifty years ago by eminent Indian Lawyers and carried on unbrokenly for the last half a century by a succession of distinguished Editors, assisted by very capable Reporters, has every reason to congratulate itself on its Golden Jubilee, marking a long period of brilliant achievement. As a lawyer practising in Madras for the last thirty years, and having had to grapple with the bulky, albeit beautifully got-up, volumes of the Madras Law Journal, I have very great pleasure in congratulating the Journal, its Proprietor and its Staff on their distinct success in the past and heartily wish them all further, and even greater, success and prosperity in the years to come.

(*Sd.*) R. N. AIYANGAR.

(*From The Calcutta Weekly Notes.*)

3, Hastings Street,
Calcutta,
18*th December,* 1940.

Dear Sir,

On the occasion of the Golden Jubilee of the *Madras Law Journal,* I send my cordial greetings to the paper which has set a fine example in prompt and accurate reporting and has been rendering further service to the profession by its current comments and well-conceived publications on case-law and Codes. Its career is a notable vindication of non-official enterprise in law-reporting. At the end of half a century of service to the law, its position as one of the premier legal journals of India is well-established and I have no doubt that it has before it a future of even greater influence and usefulness.

Yours faithfully,
(*Sd.*) J. CHAUDHURI,
Editor.

[*From The Editors, The Bombay Law Reporter.*]

Bombay 1,
9th October, 1940.

The Madras Law Journal was started in 1891, and is thus the first Legal Journal of its kind published in India. Each of its promoters reached the top-most position in the profession. One became the Advocate-General of Madras, and another two embellished the Bench of the Madras High Court. One of these rose to be the Executive Councillor of the Government of Madras. They have left indelible imprint on the early volumes of the Madras Law Journal.

In its early days, the Journal section appealed greatly to its readers. The learned and interesting leading articles and the characteristic criticism on reported cases in India were its prominent features. Gleanings from the current legal literature were then, as they still are, eagerly devoured by its readers.

The early traditions of the Journal are very well maintained. The scope of the reports-section is much enlarged by inclusion of larger number of cases and during the last fifty years the Madras Law Journal enjoys the foremost position in the Province of Madras.

We feel pleasure in offering our heartfelt brotherly felicitations to the Proprietor and his colleagues on the Golden Jubilee which they are celebrating and wish them a very long career of usefulness to the profession at large.

(*Sd.*) RATANLAL AND DHIRAJLAL.

(*From V. V. Chitaley, B.A., LL.B., Advocate, Federal Court, Delhi, and Editor, A.I. R.*)

Bombay,
16th December, 1940.

Human nature being what it is and Judges being human beings, the glaring light of publicity acts as an effective check upon human weaknesses particularly upon the Judges and also upon the members of the Bar. The latter class however is seen by the public in its true light only during the arguments in open Courts and in print when such arguments are correctly and accurately reported. The Judges, however, are open to public criticism for all time but only when their judgments are reported.

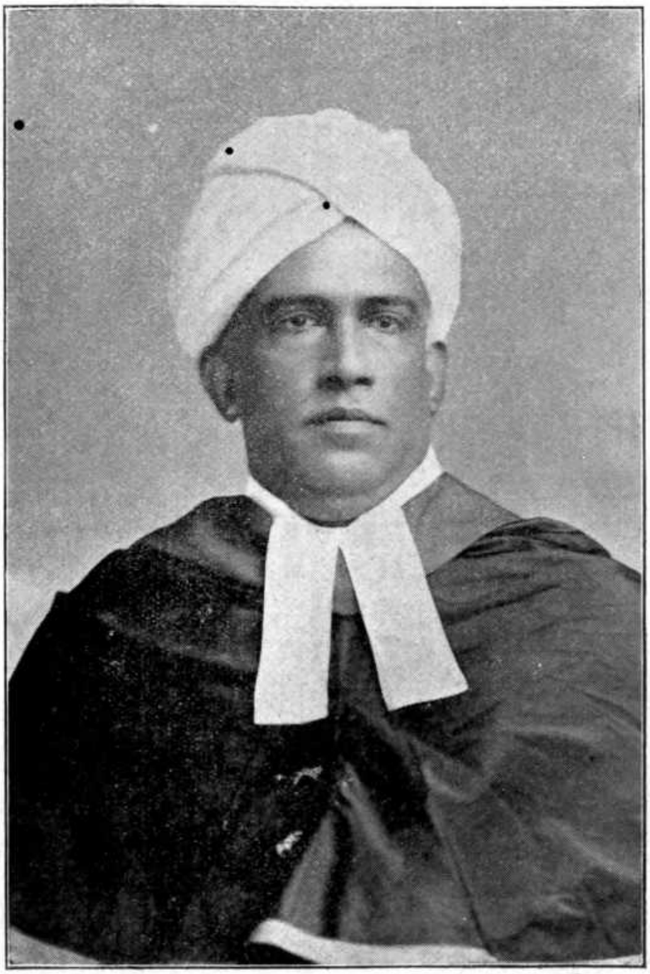
Governments that are afraid of the public criticism and the Bench when influenced by similar motives naturally desire to suppress such publicity, sometimes directly but very often by circuitous methods. The Bar also bewildered by a mass of precedents tends to move in the same direction. Unfortunately the true interests of the Bench and the Bar, the Government and the public do not really conflict with one another in this particular matter. It is extremely difficult if not extremely impossible to visualise in 1941 the circumstances in which a foundation was laid for the starting of a private law journal reporting judgments delivered in open Court but prevented from being published to the entire public, reporting arguments, not culled out, but from notes taken by counsel during the course of the arguments, criticising the judgments of the judges and very often giving a lead for the Legislature to follow. To-day the difficulties through which the stalwart founders passed and the courage which they displayed in neglecting the displeasure of those who thwarted the attempts cannot be imagined nor truly appreciated at their proper worth.

Every non-official Journal should be ever grateful to the founders of the Madras Law Journal who I believe were the first to start adventure in 1890, fifteen years after the passing of the Law Reports Act of 1875, which was expressly intended, as is clear from the history of that enactment to thwart private venture, so that the fierce publicity may be nipped in the bud.

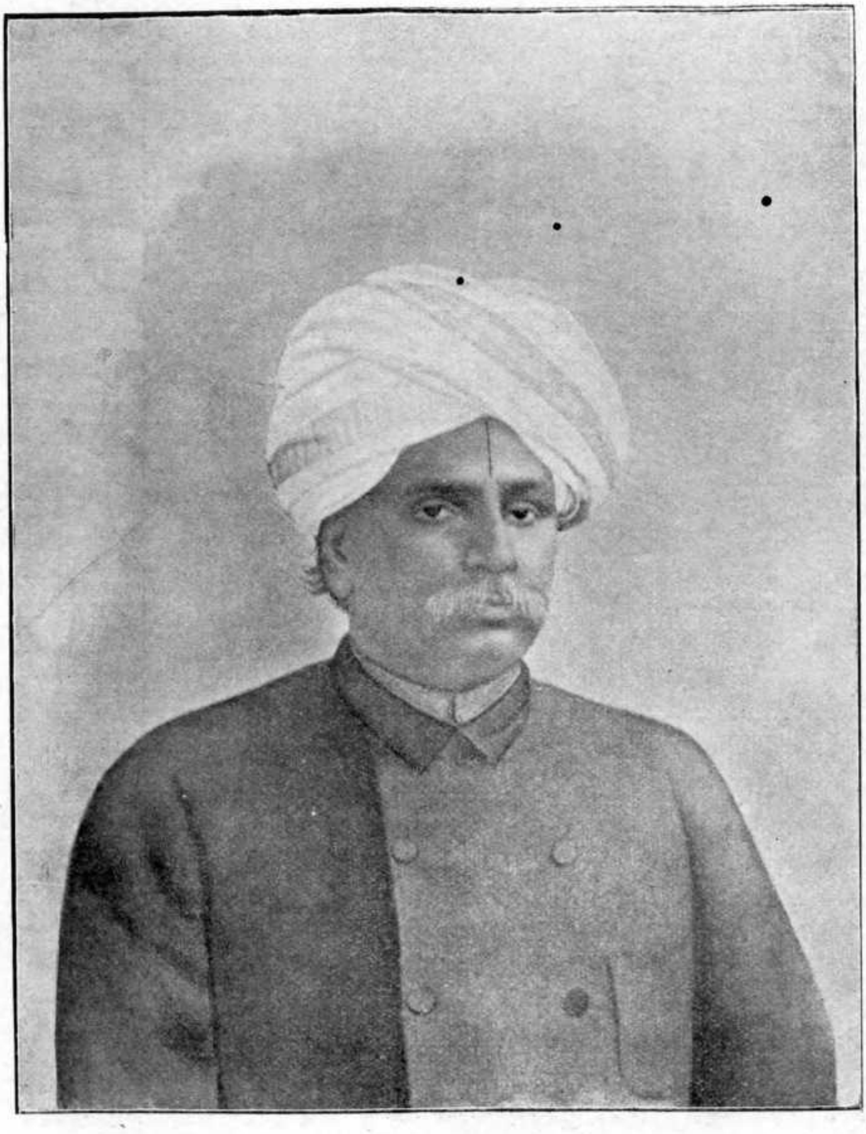
(*Sd.*) V. V. CHITALEY.

SIR S. SUBRAMANIA IYER

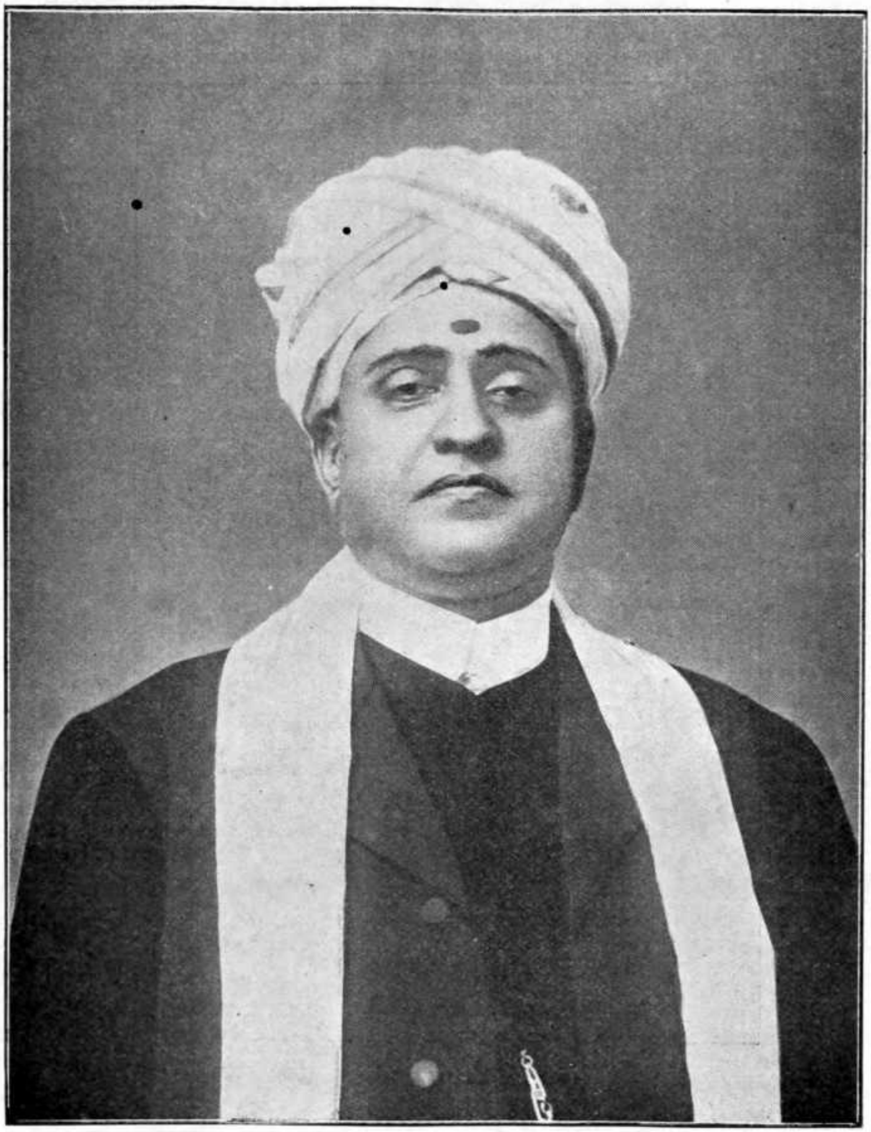
SIR V. BASHYAM IYENGAR



C. SANKARAN NAIR
Joint Editor (1891—1892)

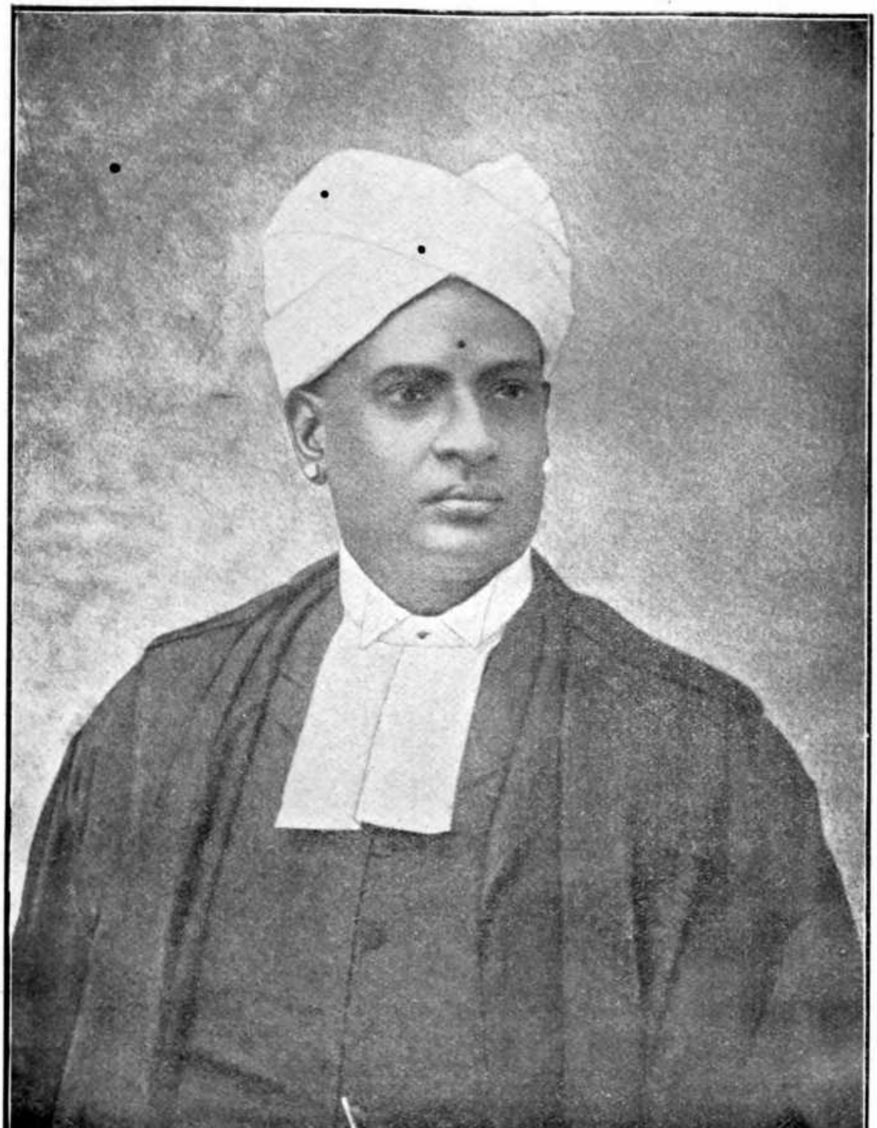


SALEM RAMASWAMI MUDALIAR
Joint Editor (1891)

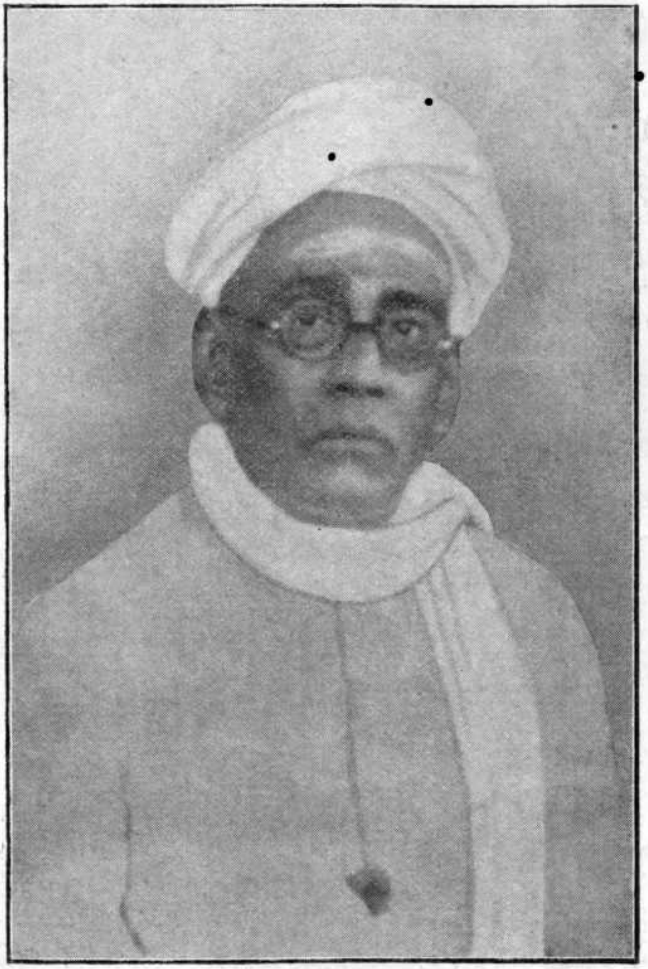


V. KRISHNASWAMI IYER
Joint Editor (1891—1909)

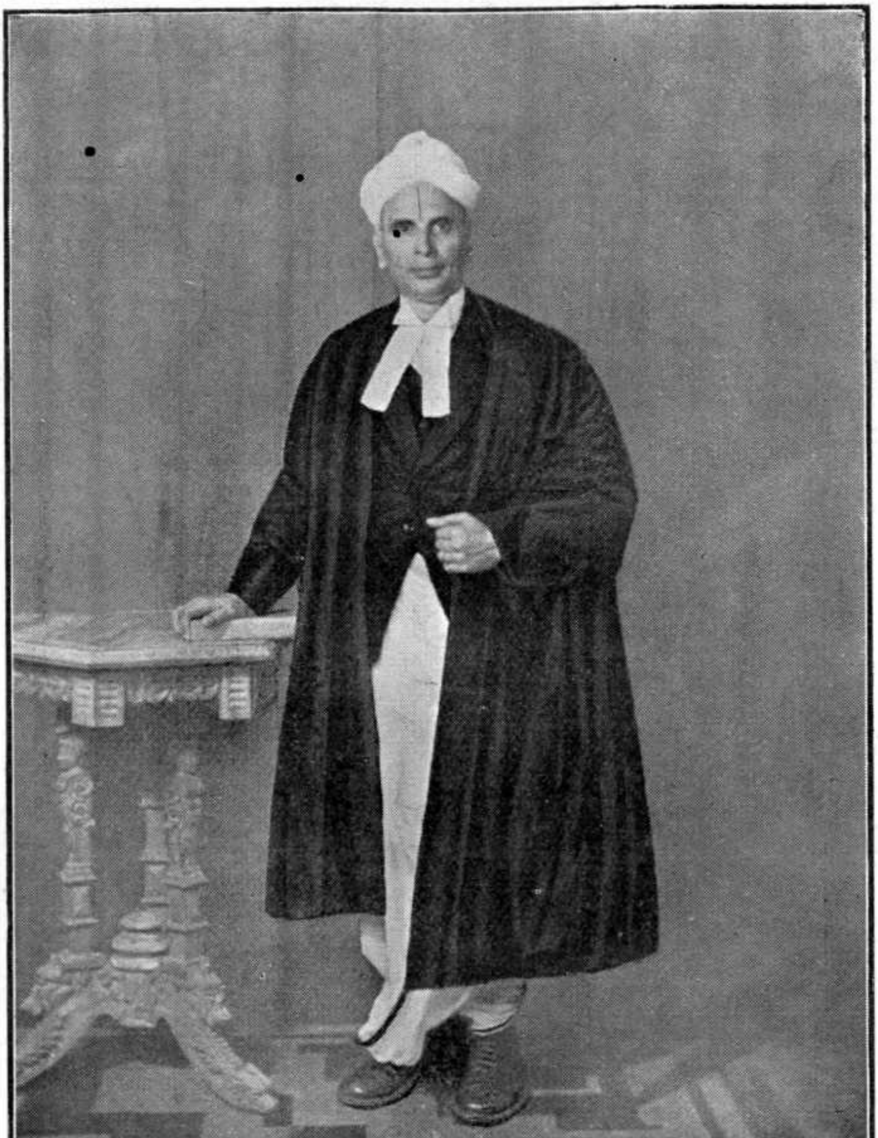
P. R. SUNDARA IYER
Joint Editor (1891—1911)



P. S. SIVASWAMI IYER
Joint Editor (1893—1907)



P. R. GANAPATI IYER
Joint Editor (1908—1910)
Editor (1911—1913)



S. VARADACHARIAR
Editor (1914—1932)

B. SITARAMA RAO
Editor (1932—1938)

THE MADRAS LAW JOURNAL: ITS EARLY YEARS

BY

SIR P. S. SIVASWAMI AIYAR, K.C.S.I., C.I.E.

The Madras Law Journal is the oldest surviving legal journal in India, and it has now completed fifty years of existence. The present proprietor of the journal wishes to celebrate its Golden Jubilee and has asked me to contribute to the Jubilee number of the journal my recollections of its early history. The Madras Presidency was practically the first in India to start a legal periodical. The first volume of the *Madras Jurist* was published in 1866. It was originally proposed to be run under the name of the *Indian Jurist*, but in the first number it is stated that a Calcutta periodical called the *Indian Jurist* which had been discontinued for some time was about to be revived. The publishers of the *Madras Jurist* did not therefore wish to adopt the name of the *Indian Jurist*. I have not come across any issue of the Calcutta periodical which was published under the title of the *Indian Jurist*. The *Madras Jurist* was published under that name till 1876; but after the issue of the eleventh volume in 1876, the publishers changed its title to 'the *Indian Jurist*' in 1877. When the *Indian Jurist* of Madras ceased to exist, I cannot remember. When the *Madras Law Journal* was started in 1891, it was stated in the introduction that the conductors of the journal had no intention of prejudicing the circulation of the *Indian Jurist* which, so far as they were aware, was the only legal journal published in India. In a country so large as India with three High Courts established by Royal Charter and a number of

Chief Courts and a large body of lawyers, there was certainly room for more legal journals than one.

The reasons which led to the starting of the legal journals were more or less the same. A medium for the discussion of legal problems was considered necessary to the advancement of the science of law. It was also felt that the decisions of the High Courts were not always beyond question and that a criticism of unsound decisions would be helpful to their rectification and conducive to the development of law on sound lines. The publication of matters of interest to the legal profession in foreign reports and periodicals was also one of the aims of the promoters of the journal. Another object which weighed with the promoters of legal journals in India was the desirability of the publication of the decisions of the High Courts with more promptitude than was shown in the officially authorised reports. Law-reporting in India as carried on by the official reporters left much to be desired. There were long intervals between the delivery of the judgments of the High Courts and their publication in the authorised reports. The reports of arguments of counsel were scarce and meagre. Notes of unreported cases were kept by some practitioners and the annoying practice of the citation of unreported cases was tolerated by the judges, to the great discomfort and surprise of practitioners who did not maintain such notes. The present series of Indian Law Reports commenced in 1876, and in the Indian Law Reports Act of 1875, it was stated in the preamble that it was expedient to diminish the multitude and expense of the law reports published in British India and to improve their quality. It was desired to create a monopoly for the authorised law reports and it was enacted that no court should be bound to hear cited, or receive or treat as an authority binding on it, the report of any case decided by any High Court other than a report published under the authority of the local government. But this provision could not prevent the court from allowing the citation of any decision not

reported in the authorised reports, if the court chose to do so. Those judges who did not wish to be embarrassed by the citation of unreported cases and considered such citation a nuisance declined to listen to them, but a good many judges listened to them willingly, and the practice of quoting such cases became very common. Many considered judgments on important questions of law and practice were not published by the official reporters, and several of the judges were not unwilling to receive light from the decisions of their own High Courts, if not also at times from the decisions of the other High Courts.

Great difficulties were experienced by the conductors of the journal in obtaining copies of the judgments from the High Court. In the second volume of the *Madras Law Journal*, complaint was made that the Chief Justice refused to grant permission to the conductors of the journal to have access to the judgments of the court for the purpose of publication. The editors of the journal had to procure copies of judgments through the parties or the clerks of their counsel. Even this practice was disliked by the official reporters and the judges; and the editors referred, in the opening number of the journal for 1893, to a rumour that copies of the judgments were not to be furnished even to the parties until the Government reporter had had them. This grievance was redressed later on, and the High Court has now allowed the editors to obtain copies of judgments. A few of the judges, instead of welcoming publicity to their decisions, seem to have laboured under the fear that their bad judgments might be reported and exposed. I believe that the judges of the present day are not actuated by any such fear, even though they may be aware of their own fallibility.

I may now say a few words about the origins of the *Madras Law Journal*. The idea was mooted by the original editors of the journal and encouraged by the leaders of the profession with whom they discussed it. The impulse was due to the activities of what I may be permitted to call the Saturday Club in Mylapore. I do

not remember when exactly this club came into existence, whether in 1889 or 1890. It was an informal affair, without any constitution, and consisted of about a dozen members, who used to meet every Saturday at about 11 o'clock at the house of Sir (then Mr.) S. Subrahmanya Aiyar, the seniormost among the leaders of the Vakil bar. Sir (then Mr.) V. Bhashyam Aiyangar and Mr. C. Ramachandra Rao Saheb were the other leaders who attended the meetings. Among the junior members of the bar were V. Krishnaswami Aiyar, P. R. Sundara Aiyar, Sir (then Mr.) V. C. Desikachariar, myself and a few others. I doubt whether any members living outside Mylapore attended our gatherings. Our meetings lasted for about two hours and we used to discuss important decisions in the Indian Law Reports, especially those which seemed to us to be open to question. The task of selecting the cases for discussion was divided between four or five of the junior members. These discussions were valuable and instructive and supplied us with much material for use in the *Madras Law Journal*, when it came into existence. Our Saturday meetings were continued for about three or four years ; probably they came to an end on the appointment of Sir Subrahmanya Aiyar as acting Judge of the High Court in place of Sir T. Muthuswami Aiyer who took leave from November, 1891 to February, 1892, for the first and last time in his life during his whole period of government service which extended over a period of more than 37 years.

The original editors of the *Law Journal* were Rai Bahadur Salem Ramaswami Mudaliar, Sir (then Mr.) C. Sankaran Nair, V. Krishnaswami Aiyar and P. R. Sundara Aiyar. Mr. Ramaswami Mudaliar had a knowledge of Sanskrit and was interested in the publication of translations of Sanskrit texts. Unfortunately he contracted a serious illness in the latter part of 1891 which proved fatal in March, 1892. Mr. Sankaran Nair continued to be one of the editors till the end of 1892. It was in 1893 that I was asked by the surviving editors to join them in

the conduct of the journal. I severed my connection with the editorship on my appointment as Advocate-General at the end of 1907. Mr. V. Krishnaswami Aiyar kept up his connection till he became a High Court Judge in 1909, and Mr. P. R. Sundara Aiyar's connection continued till he became a Judge in 1911.

As regards the contents of the *Law Journal*, they were very similar to those of the *Indian Jurist*: there were leading articles on important questions of law, articles on legislative measures, on the administration of law and justice, reports of important decisions of the High Court, notes of English cases, and reviews of books. A novel feature introduced by the Madras Law Journal was translations of Hindu Law books which had not been translated. I was requested to undertake the translation of portions of the Mitakshara which had not been translated and which had a bearing upon topics of interest to the lawyer, for instance, the chapters on impurity and marriage. The very first number of the *Madras Law Journal* contained a translation of the Acharadhyaya of the Mitakshara. Those who are conversant with the style of exposition adopted by the Sanskrit commentators will appreciate the difficulties of combining accuracy of translation with elegance. My aim was accuracy rather than literary elegance.

One handicap under which the editors of the *Law Journal* laboured was the absence or paucity of literary contributions from outsiders. Outside contributions were received now and then later on, but the fact that the articles had to be written by the editors themselves who were practising lawyers often led to delay in the publication of the journal.

It was subsequently decided to separate the reports of decisions from the other portions of the journal and publish them in distinct parts.

The foreign periodicals which we looked upon as models were the *Law Quarterly Review* which was started by Sir Frederick Pollock in 1885, and the *Harvard Law*

Review which came into existence in 1887 and was conducted by the Harvard Law School Association. We admired the felicity of style of Sir Frederick Pollock, and the learning displayed in both these journals. It was not possible for us to vie with the one or the other, but these were the ideals which we kept before our eyes.

The dissatisfaction which was felt by the Madras bar with regard to the Indian Law Reports was felt by the members of the profession in other provinces. The causes and motives which brought the *Madras Law Journal* into existence operated to bring similar journals and reports into existence in the other provinces. The *Calcutta Weekly Notes*, edited by Mr. J. C. Choudhry, was first published in 1896. This was followed by the *Bombay Law Reporter* in 1899, the *Calcutta Law Journal* in 1905 and the *Allahabad Law Journal* in 1906. They have since been followed by a large crop of legal periodicals all over India; and I understand that the number of such periodicals at the present time is over thirty. The *Indian Jurist* disappeared long ago, and of the surviving periodicals, the *Madras Law Journal* occupies the seniormost place. It is to be hoped that this journal will continue to maintain its pride of place for many years more and fulfil the objects of the founders.

[The later history of the *Madras Law Journal* can be shortly told. When Sir (then Mr.) P. S. Sivaswami Aiyar severed his connection with the journal on being appointed Advocate-General, Mr. P. R. Ganapathi Aiyar who was one of the sub-editors of the journal from 1906 was made joint editor along with Messrs. V. Krishnaswami Aiyar and P. R. Sundara Aiyar. On Mr. Sundara Aiyar's elevation to the Bench in 1911 an Editorial Committee was constituted to guide the conduct of the journal. The Committee has been functioning since then. Its original members were the Hon'ble Mr. T. V. Seshagiri Aiyar, Sir (then Mr.) K. Srinivasa Aiyangar, Messrs. P. R. Ganapathi Aiyar, S. Srinivasa Aiyangar and S. Srinivasa Aiyar. Mr. Ganapathi Aiyar was the Editor-in-charge and he continued in that capacity till 1914 when he resigned. Thereupon Sir (then Mr.) S. Varadachariar who had been a sub-editor of the journal from 1908 to 1910 took charge of the editorial work and continued as the

Editor-in-charge till his appointment as Judge, of the High Court in 1934. He was succeeded by Mr. B. Sitarama Rao as Editor who served in that capacity till he was appointed Government Pleader in 1939. Among those who have served or are still serving on the Editorial Committee, apart from the first members thereof may be mentioned the names of the late Dewan Bahadur L. A. Govindaraghava Aiyar, Sir Alladi Krishnaswami Aiyar, Mr. T. R. Venkatarama Sastri, C. I. E., Rao Bahadur K. V. Krishnaswami Aiyar and Messrs. T. M. Krishnaswami Aiyar, C. A. Seshagiri Sastri and S. Panchapagesa Sastri.]—*Editor*.

HINDU LAW REFORM

BY

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It is more than thirty years since I first advocated the reform of Hindu Law before the Vakils of the Madras High Court at their social gathering.[1] Since then, some noteworthy changes in the rules of Hindu Law have been made by legislation and decisions. The rule in the *Tagore case* that a donee or a legatee must be a person in existence at the date of the gift or at the death of the testator has been abrogated by the Legislature. The Hindu Gains of Learning Act, 1930, has effected a wholesome change in the law relating to the earnings made by a person who was maintained and educated at the expense of the family. The Hindu Inheritance (Removal of Disabilities) Act has also remedied to some extent an injustice, but its usefulness should be extended by making it applicable also to those governed by the Dayabhaga school of law, and by removing the remaining disabilities too. The Hindu Law of Inheritance Amendment Act, 1929 and the Hindu Women's Rights to Property Act, 1937, are steps in the right direction but require legislative rectifications substantially in order to make them juster and less imperfect.

While all are agreed that there is an urgent need for reform in many directions in Hindu Law, the will to take concerted action is lacking. Hindu lawyers, legislators, political leaders and Government should act together so as to place before the public a set of carefully drawn pro-

1. *See* my book "Law Reform and Law"; *see also* 19 M.L.J. 297 (Journal section).

posals which could be the basis of Bills to be sponsored either by Government or unofficial members of the Legislature. Naturally, the task falls in the first instance upon the Advocates' Associations and the Bar Councils, legal journals and influential newspapers throughout the country. It is a matter for profound regret that they have not yet taken any active steps in the matter.

At the outset, I would like to stress the urgent need for the codification of Hindu Law. This has long been overdue. The rules of Hindu Law had to be laboriously constructed out of ancient Smritis and their commentaries and out of discordant practices and conflicting decisions. To-day, however, many of the rules of Hindu Law are fairly well-settled and the task of codification is far easier. The precise rules of Hindu Law are not accessible and intelligible even to educated Hindus unless they are trained lawyers. There are also gaps and obscurities still, not to speak of conflicts between the several High Courts. They can all be clarified and settled only by legislation. Uncertainty and the heavy expense of litigation in ascertaining and applying the rules of Hindu Law still continue to be disturbing features. The advantages of codification have nowhere been more appreciated than in India where legislation has covered a very wide field. The Transfer of Property Act, the Succession Act, the Trusts Act, the Easements Act, the Contract Act, the Partnership Act and the Sale of Goods Act afford instances of complex and difficult sets of rules being more or less satisfactorily systematized and codified by the Indian Legislature. In England, great changes by way of simplification and codification of the intricate Property Laws were carried out first by Lord Birkenhead's Act, 1922 and later by the great Property Acts of 1925. Rules of Hindu Law are quite susceptible of codification and there are no insuperable difficulties in that connection, either because of the distribution of powers under the Government of India Act or otherwise. The advantage to the community will be very great. It will result in systematized formulation of the rules of Hindu Law characterised by far greater

lucidity, certainty and uniformity than exist at present, and will consequently reduce materially the risk of injustice and the expenditure on litigation. It will certainly facilitate the work of judges and may even help to limit public expenditure on a large judiciary. It will give greater confidence to persons dealing with Hindu families, such as creditors, alienees or partners and will thus increase the economic efficiency of Hindus in general. It will also minimise victimization and exploitation of illiterate or ignorant members of Hindu families and curtail strife in families. Above all, the work of codification will enable further reforms in Hindu Law to be effected justly and harmoniously and with full comprehension of their consequences throughout the whole range of Hindu Law by preventing the kind of haphazard and piecemeal legislation which is so much in vogue to-day and which often gives rise only to fresh difficulties and injustice and to increase in litigation.

The case for codification is considerably strengthened rather than weakened by the existence of customs or customary law which supersede or modify the rules of Hindu Law in varying degrees. Custom no doubt had its value in the past when primitive rules became imperceptibly adjusted to suit an advancing civilization or progressive opinion and when there were no legislative bodies that could enact laws of binding force. But local or family customs no longer serve their original purpose. The vitality of customs as a law making factor in contemporary India is but a myth, for their title to legal recognition depends on their antiquity as well as certainty. The customs themselves have also long outlived the needs of the ages in which they had their birth. The great practical advantage of certainty, uniformity and clarity which are the characteristic features of the laws of property and succession in advanced civilizations ought to prevail as against the sentiment and reluctance of antiquarian or conservative lawyers or of those who want to keep Hindu India in a museum of dead things.

Again the clamant needs of Indian nationalism require a single and easily ascertained territorial law of property and succession applicable to Hindus and Muslims alike in supersession of their divergent and intricate personal laws. A territorial law that should be common to Hindus and Muslims should, of course, not cover the topics of marriage, divorce, adoption and religious endowments. But such a law even so circumscribed will not be visible in the offing for another half a century.

The unification, however, of Hindu peoples at least throughout India in the matter of their laws of family and of property and succession, has become increasingly feasible and should therefore be regarded as of immediate and paramount importance. We must not forget that the unification of Indian Muslims has been effected by the Mappilla Succession and Wills Acts, the Cutchi Memon Act and, above all, by the Shariat Application Act, 1937. While we want no doubt Hindus and Muslims to become one nation, that process will be considerably facilitated and accelerated if the Hindu communities—for they are not one community—become a Hindu union governed by a uniform set of legal rules, subject of course, to necessary exceptions and savings. Linguistic and sectarian differences amongst Hindus and differences in social habits are more or less inevitable. But it is neither necessary nor desirable that Hindus should be governed by separate systems or schools of law which are amongst the most powerful factors that continuously operate against Hindu solidarity throughout India. We may not always be conscious of their separatist influence, but shall realise what a hindrance they have been when we deliberately seek to discard them in favour of a uniform system. The influence of law on the family and social life of a people and on their outlook is by no means negligible; and under Indian conditions when discordant legal environments are added to other social differentia they exert a force which is decisively centrifugal. For these reasons the only course which is itself implicit in the development

of Hindu Law is to take the Mitakshara, the Dayabhaga and the Mayukha laws together and to select what appear to be more reasonable or progressive rules and weld them into a single body of Hindu law.

The Hindu law and not the Succession Act should be made the territorial law of the whole of India applicable to all its inhabitants except Mohammadans, Indian Christians, Parsis, Jews and Anglo-Indians whose personal laws will continue in full force. Foreign nationals will be governed by their own laws. Hindus have now realised that changes in their laws of property and succession are not changes in their religion and that there is nothing sacrosanct about them. The Hindu Gains of Learning Act, the Hindu Law of Inheritance Amendment Act, the Hindu Women's Rights to Property Act and even the Child Marriage Restraint Act and the amendments to the Special Marriage Act have been more or less cheerfully acquiesced in. And we need not expect any strong opposition either to the codification of Hindu Law or to well considered reforms in any part of Hindu Law. Where there is such an opposition the proposals can, of course, be suitably modified. Experienced Hindu lawyers, legislators and political leaders and prominent men in Hindu society should, acting together, set about the task of drafting a Hindu Code with the assistance of various Advocates' Associations and should place it before the Government and the public for criticisms and suggestions with a view to make the Government and the Legislature take up its enactment.

Next I should like to suggest specific changes in some of the rules of Hindu Law. They are not meant to be exhaustive and the reasons for them can only be briefly indicated. Both my suggestions and reasons can be, and I hope will be, amplified by other Hindu lawyers. My aim now is but to provoke thought and to focuss attention on the lines the reform of Hindu Law should take. As a result of discussion better solutions for some of the difficulties may be found, and other defects might emerge

calling equally for improvement. Any proposals for the reform of Hindu Law however should, I think, satisfy certain tests. They should not, exceptional cases apart, involve any violent break with the past, but should follow, more or less, the lines of the most progressive thought in our jurisprudence taking all its schools together. We cannot create a new heaven and a new earth. Our reforms should strive to eliminate anomalies without being over-logical and, avoiding subtleties, should aim at easy and straightforward administration of the law. Above all, they should make for social improvement and economic efficiency and should conform to modern standards of justice and equity.

Almost every department of Hindu Law stands in need of reform. The Law of Marriage requires amendments in some directions. The time has certainly come for the Hindu society to discard polygamy as a rule of Hindu Law. According to early Hindu Law monogamy was the approved rule and polygamy was an exceptional provision. It was only when the wife was barren, diseased or vicious or when she consented, that she could be superseded and a second marriage could be validly contracted. The right to take more than one wife in former days required legal justification ; but the present rule of Hindu Law that a husband is not restricted as to the number of his wives and may marry again without the wife's consent or any justification, is far worse. It is no longer in accordance with modern enlightened opinion as to the status of women or the standard of justice that should govern marital relations, that we should have in this matter one law for men and another for women. In these days when equality of women must be recognised, at least in this connection, it would be folly to postpone this reform. To-day, women, especially educated women, are deeply discontented with the present law and I have no doubt that many educated men also share their views in this matter. Marriages contracted between Hindus under the Special Marriage Act are monogamous and surprisingly enough the marriages of those who are governed by the

Marumakathayam Law of Malabar have become monogamous by a recent statute while the general Hindu society still clings to polygamy. The reform is to my mind one of the most urgent needs and does not require elaborate justification.

I would also suggest legislation making it clear that when one is insane or an idiot one is incompetent to marry I have no doubt that this is the correct rule of Hindu Law, but there seems to be a serious difference of opinion on the point. In *Venkatacharyulu* v. *Rangacharyulu*[1] it was observed that the marriage of a person of unsound mind if duly solemnised is a valid marriage. The Privy Council in *Mouji Lal* v. *Chandrabati Kumari*[2], proceeded on the assumption that insanity at the time of marriage might make it invalid. The question has been discussed in the 10th Edn. of Mayne's Hindu Law at page 151. It may be that instances of such marriages are rare, but the rule of law ought to be made quite clear by the Legislature.

Hindu Law has unfortunately recognised along with polygamy concubinage and illegitimacy as legal status with special rights. When we seek to establish monogamy as a rule of Hindu Law it is necessary to put an end to these disfigurements of the Hindu system. There can be no pretext that these are required by Hindu religion or Hindu morality. Both emphatically condemn these practices. A further anomaly exists that while an illegitimate son of a Sudra is an heir the illegitimate son of a Dwija is not. This retention of an invidious differentiation due to caste is not in accordance with the spirit of the times and does not conduce to intercaste harmony and goodwill. The whole of this chapter therefore deserves a summary repeal at the hands of the modern legislator. The provision for maintenance in the Criminal Procedure Code or any other similar rule which should however be not such as to encourage concubinage should alone be recognised if we are to establish

1. (1890) I.L.R. 14 Mad. 316=1 M.L.J. 85.
2. (1911) I.L.R. 38 Cal. 700=L.R. 38 I.A. 122=21 M L.J. 933 (P.C).

monogamy and raise women to equality. While some small provision for the maintenance of illegitimate children may be made or retained, an illegitimate son should *not* have the status of a son in the family for any purpose.

Women's conferences as well as politicians and members of the Legislature are agitating for a right of divorce for women and all sorts of fantastic suggestions have been made. I think that dissolution of marriage should be allowed to a minimum extent where justification for it is of the plainest description and where it will raise the standard of morality, but not to such an extent as will lead to a general loosening of the marriage tie and promote immorality and the ruin of the Hindu family ideals. I can only indicate my precise views on the subject in the form of a Bill :—

(1) A husband or wife may present a petition for dissolution of marriage to a Court of the lowest grade competent to try a suit on the ground that the respondent

(*a*) is incurably of unsound mind and has been continuously under care and treatment for a period of five years immediately preceding the presentation of the petition ; or

(*b*) is suffering from an incurable or virulent form of leprosy ; or

(*c*) has deserted the petitioner without just cause for a period of at least five years immediately preceding the presentation of the petition ; or

(*d*) has become a convert to Christianity or Mohammadanism ; or

(*e*) has been suffering from venereal disease in a communicable form for a period of at least three years immediately preceding the presentation of the petition ; or

(*f*) on the ground that the respondent, if a husband, has any other woman as a concubine or, if a wife, is a concubine of any other man.

(2) Nothing herein contained shall affect any right of divorce which a person may have under any local, tribal or family custom.

(3) On a petition for dissolution of marriage it shall be the duty of the Court to inquire so far as it reasonably can, into the facts alleged and whether any collusion exists between the parties.

If the Court is satisfied on the evidence that

(*a*) the case for the petitioner has been proved ; and

(*b*) that the petition is not presented or prosecuted in collusion with the respondent,

the Court shall pronounce a decree dissolving the marriage; but if the Court is not satisfied with respect to either of those matters it shall dismiss the petition.

(4) The Court may, in its discretion, make either by the decree dissolving the marriage or by separate order, such provisions for the maintenance of the wife and for the custody of children as may seem just, provided that no order shall be made entitling the wife to maintenance after her remarriage.

Prohibition of sagotra marriages has been felt to be a serious restriction of the field of choice. It does not apply to the majority of Hindus, but only to the first three castes. The belief in the old days was probably that the members of a Rishi gotra were all of one blood. But people of different sub-castes have the same gotra and it is noteworthy that there is no real feeling of consanguinity between persons merely because they have the same Rishi gotra. A law giving greater freedom of choice need not be availed of except by those who feel no religious scruples. I have no doubt we ought to repeal this archaic and drastic rule which has no longer any vital significance.

The rule as to prohibited degrees, however, rests on different considerations. I should think the rule of five degrees on the mother's side and seven on the father's side is unnecessarily wide and may well be reduced to three degrees on the mother's side and four degrees on the father's side. From the Satapatha Brahmana it appears that the old Vedic prohibition extended only to the third or fourth degree.[1] The present rules as to

1. Sat. Brah. I, 8, 3, 6 Vedic Index, I, 475.

prohibited degrees have no eugenic value and have not in fact made for racial improvement. All that is necessary is that the rule should be so framed as to prohibit what may reasonably be regarded as an incestuous marriage or as one carrying with it any taint of sin or qualms of conscience. It is a travesty of the religious motive underlying the prohibitory rule that in respect of remoter sapinda and sagotra marriages the injunction should be strictly observed, while for instance the marriage of a sister's daughter or of a man with the daughter of his mother's brother or with his father's sister's daughter which is plainly opposed to the ancient Smriti rules should be allowed by custom especially in South India. (Mayne's Hindu Law, 10th edition, Paragraph 118). It is absolutely necessary on all grounds that the marriage of a man with his sister's daughter, but not the other two customary marriages, should be made illegal amongst all castes by legislation notwithstanding any custom.

The distinction between approved and unapproved forms of marriage is not one that should be continued in modern times. There is no public opprobrium attached to Asura marriages in these days. Both Asura and Brahma marriages are performed with religious rites. The old rule that in the Asura form of marriage a wife does not pass into the husband's gotra is no longer law. Frivolous questions have been raised as to whether defraying the expenses of a girl's marriage by the bridegroom or his family constitutes an Asura marriage. All marriages when valid, must be approved marriages ; and there can be no degrees of validity. The climax of absurdity is reached when the marriage of a divorced woman or a widow is regarded as an approved marriage. In *Hira* v. *Hansji*,[1] it was held that money paid to the parents of the bride to be paid to her third husband to procure her divorce was not bride price and the marriage was not in Asura form but in Brahma form. The proposed change will

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1. (1913) I.L.R. 37 Bom. 295=17 I.C. 949.

result also in the simplification of the rules of Stridhana succession.

The Law of Adoption also requires changes to suit the present day conditions of society and the revolution in opinion that has taken place. The rules prohibiting the adoption of a daughter's son, a sister's son or a mother's sister's son must be repealed throughout India. No proof of custom, such as exists in Southern India permitting such adoptions, should be required anywhere. Nobody need adopt any of them if he has any religious objection to do so. It is only the liberty to make such adoptions that will be given by legislation. So also, the rule that no one can be adopted whose mother in her maiden state the adopter could not have legally married, which applies only to the first three classes,should also be repealed. Adoption is at least as much a secular as a religious act and for the vast majority of Hindus these restrictions do not apply. Distinctions due to difference of caste should, as far as possible, be abolished so as to make the rules of Hindu Law uniform.

My conviction as a result of long experience has been against extending unduly the widow's power of adoption. It leads in many cases to strife and litigation which do not make for temporal welfare. But the law in Madras as to the widow's power to adopt ought to be assimilated to that in Bombay. The present rule that a widow can adopt in the absence of her husband's consent with the consent of her husband's sapindas is in most cases but a tedious and expensive formality while in some cases it operates as a very real hardship. Having in view the increase in litigation and perjury occasioned by this requirement, the widow in South India should, as in Western India, be enabled by legislation to adopt a son to her husband irrespective of any consent of her husband or of her husband's sapindas. It should however be an absolute rule that where a husband's authority is given it should be in writing always. It is a much more momentous transaction than a mortgage, sale, gift or lease

and now that wills are also required to be in writing, this requirement of writing must be made compulsory.

The present rule that a minor widow can make an adoption leads to the very gravest abuses. Accordingly, the law should be amended so as to enable only an adult widow to make an adoption.

The adoption of daughters by dancing girls should be altogether prohibited. The fine distinctions drawn by the Madras High Court with regard to it are altogether untenable and the law should be in the direction of promoting morality. The paramount consideration should be the welfare of the young children. To recognise the custom of allowing dancing girls to adopt tends to promote prostitution and to corrupt youthful and innocent minds. The Legislature should, therefore, prohibit such customs which in the rest of India are rightly regarded as illegal.[1]

Next, even on the view that the adoption of a son should be judged on the grounds of religious efficacy, it is only just that the power of adoption should not be exercised by a widow long after her husband's death so as to enable her to disturb successions which had already taken place. A widow who wants to make an adoption should, therefore, be required to make it within, say, three years of her husband's death or, if she was a minor then, within three years from her majority. Adoptions made long after the husband's death can in no sense be made from any religious motives and there is no necessity therefore of keeping this power indefinitely in suspense. The religious motive indeed requires an adoption soon after the death of the man to whom it is made so that his sraddhas may be uninterruptedly performed by a son. Now that the Hindu Women's Rights to Property Act, whether in a divided family or in an undivided family, whether there is male issue or not, in all cases vests in the widow either her husband's share or the share of a son, the widow does not require the power of adoption as a sword or a shield against reversioners or coparceners till the end of her life.

1. Mayne, 10th Ed. pp. 73-74.

The legal fiction of adoption indeed suggests that this kind of posthumous son should come into existence within a year of his father's death. Three years from her husband's death or from her majority should suffice for a widow to make up her mind and to select a boy. Any legislation fixing the time limit should apply also to widows who had not exercised the power before the enactment by giving them three years from its commencement.

In the field of inheritance also several changes are called for. While the Hindu Law of Inheritance Amendment Act rightly alters intestate succession under the Mitakshara Law and brings in some near bandhus in the scheme of succession before most agnates, in accordance with the ties of affection and blood, it is still seriously imperfect and unjust. It provides that a son's daughter, daughter's daughter, sister and sister's son, shall in that order come in as heirs after the paternal grand father and before the paternal. uncle. But it omits to provide for cognate descendants of the deceased owner who are nearer bandhus than the sister and her son. Son's daughter's son, son's son's daughter, daughter's son's son, son's daughter's daughter and daughter's daughter's son, are in the direct line and nearer bandhus than the sister and her son and it is not uncommon that one or other of them is in existence at the time of the death of the owner. They should all be brought in before the sister and her son.

By far the most important reform that is required in the Law of Inheritance is to recognise a daughter's right to share or to inherit along with the son. According to the rule of Hindu Law the daughter comes next after the widow as also in default of her. This has been altered by the Hindu Women's Rights to Property Act under which a widow succeeds even along with her sons or step-sons and not as before in their default, and the rights of succession of widowed daughters-in-law and grand daughters-in-law are also provided. The rights of daughters are materially affected by it. But in any view there is no good reason why the daughter of a man should not take along

with his sons and his widow. A text of Manu says : "A son is even as one's own self and the daughter is equal to the son. So long as she is there as the father's self, how can any other take the property?" So, too, Brihaspati : "A daughter like a son springs from each member of man ; how then should any other mortal inherit the father's property while she lives?" If we look into our unsophisticated hearts, how can we disinherit our daughters in the presence of our sons or postpone their rights to those of our wives or of our sons' and grandsons' and great grandsons' widows? There should be no serious objection to this reform which at one stroke would place all Hindu women on a much better footing than at present. A son's wife will also bring into her husband's family her half-share in her father's estate since she will be entitled to share with her brother. The distinction between the son and the daughter is not one that in an age of enlightenment should be maintained and even if they are not to have equal shares, there should be no reasonable objection to giving the daughter half the share of a son as the daughter is as dear to the parents as the son and it cannot be assumed that in her husband's family she will be always comfortably provided. In any view the daughter's rights must be regarded as superior to the rights of the predeceased son's widow or predeceased grand son's or great grandson's widow which the Legislature has now fully recognised.

A further reform is in this connection required. The estate taken by the daughter, the sister or any other female born in the family should be throughout India an absolute estate as it is in Bombay. The rules of succession to Stridhana property depending, as they do, upon the kind of Stridhana and upon the form of marriage should be simplified by providing uniform rules of succession. The Mitakshara rules are the simplest and best and should apply in all the provinces and schools. Absolute rights of women over all species of Stridhanam should be fully established. The rule that a woman succeeding as

heir to another woman's Stridhana can take only a qualified estate should be repealed.

I would also like to suggest that while the manager of a Hindu joint family and a Hindu widow should continue to possess more or less their present powers, a clearer and fuller statutory definition is required. The power of alienation for the benefit of the estate should not be confounded with the power to alienate for necessity, but should be separately and clearly defined so as not to restrict it unduly. The karta and the widow should alike be enabled to apply to a Civil Court to approve of their proposals for an alienation with or without modifications. A certificate of the Court should afford the alienee full protection except where there has been fraud or collusion in obtaining the approval of the Court. The procedure in this connection may allow notice to the junior members or the reversioners whose objections may be heard summarily. In complicated cases involving a protracted inquiry the Court can refuse to advise the manager or the widow. Such a procedure would go a great way to prevent injustice being done either to reversioners or to the alienees by postponing an enquiry till almost all the evidence has disappeared and the Court is no longer in a position to judge all the relevant circumstances as at the time of the alienation.

The law relating to impartible estates is in a very unsatisfactory state. The proprietor's power of alienation which is recognised in the rest of India is denied by a Madras statute. The rights of junior members of the family to maintenance from the ancestral estate are obscured by conflicting decisions both in the Privy Council and in the Indian High Courts. Supposed reasons of State which are nothing more than a false sentiment in favour of the past have preserved the peculiar character of these estates. They have long ago ceased to be either principalities or feudalities. Public policy should now recognise that these are mere anachronisms which are a source of frequent litigation and family strife and do not

conduce either to the growth of sound national economics and of democratic ideas against privilege and injustice; or to the maintenance of a proper family and social life, or to the contentment of the tenantry. These impartible estates should therefore be made partible as well as alienable and should be governed by the ordinary rules of succession. If, however, they are to retain their impartible character, the rights of junior members to maintenance, however remote in degree, should be declared, as that can be the only possible justification for preserving their integrity.

Lastly, reforms are also required in the Mitakshara law of coparcenary. Serious inroads have been made into the coparcenary by the rules regarding the son's liability for his father's debts, by the doctrine of severance in status by unilateral declaration of intention, and by the recent enactment that a widow of an undivided member takes her husband's interest in the coparcenary property. It is time to declare that every member of a joint family is entitled to his specific share and to abrogate the rule of survivorship so as to make the members of the joint family hold the family property in quasi-severalty, as tenants in common. The Legislature should lay down only one mode of succession and the rules of inheritance should be the same whether the family is divided or undivided and whether the property is joint or separate. In other words the Dayabhaga joint family system should be made universal in India and the glittering doctrine of the son's right by birth and the anomalous, antiquated and unjust doctrine of survivorship discarded. The present attenuated rules governing a Mitakshara coparcenary do not protect the joint family in the enjoyment of its property but operate only as a hindrance to its economic efficiency. Right by birth and survivorship, and the restrictions imposed by them on the power of alienation and the deprivation of the right of succession of those who are nearer and dearer to a deceased male member than a coparcener are all outworn indicia of the ancient type of family which has become almost extinct. The large urban life of these

days, the consequent separation of the members of the family and their employment or avocations in distant parts of the country and above all, the new ideas of individuality and the consequent conflicts in the aims and aspirations of the various members of the family have resulted in the emergence of the modern Hindu family life which is both in actuality and in sentiment far removed from the spirit and purpose, the area and the ideals of the ancient joint family system. The new spirit has penetrated even to remote villages and there is no need any longer for the retention of the ancient legal formulæ which only vex our hearts and entangle our feet and hinder economic planning and improvement as well as affect adversely the smooth co-operation and sweetness between coparceners which should characterise family life.

MUSLIM LAW AS ENFORCED IN INDIA : ITS DEVELOPMENT DURING THE LAST 50 YEARS[1]

BY

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It is with great pleasure that I accede to a request for a contribution to the Jubilee number of the Madras Law Journal. This publication is, I believe, the premier in age amongst the Law Journals of India, and may well be awarded the first place in several other respects.

The development of Muslim law in India, if taken in its larger sense, would involve an explanation of the origin and reasons for the establishment, half a century ago of such a journal as this, having the aims and aspirations that have, with eminent success, been pursued since its first publication.

It is therefore necessary to restrict oneself to a narrower aspect.

The enforcement of Muslim law in India was well established fifty years ago. The conception had originally been formulated under Warren Hastings. Fundamentally it may be attributed largely to a conscious desire for acknowledging in the most unequivocal manner a great principle,—the principle that it is just that persons belonging to diverse religions and following distinct courses of life, be permitted to continue observing their individual systems of law and conduct. Perhaps to an even greater degree Muslim law was accorded recognition because of a reluctance to undertake gratuitous legislation which would

1. Copyright in the author.

first unsettle and then adventure to rearrange the lives of groups of human beings who had for a long period been passing their lives in ways peculiar to themselves, and were satisfied with their existing modes of life.

Muslim personal law in regard to those questions which affected Muslims alone and which did not affect the general body outside that group, was thus in the natural course and on the principle of acting on lines of least resistance, left undisturbed. Matters relating to inheritance and succession and to the family life are peculiarly of that nature: they do not affect outsiders. On the other hand uniformity had to be enforced in regard to penal law, to the methods for deterring men from committing crimes, to all questions of adjective law, as well as to the law of contract and of similar dealings or transactions, the parties to which may be persons following different systems of law. Specific personal systems had in such matters to give place to the general law. In modern India the general law as we must understand that term in its present context, is mainly laid down in legislative enactments ; where it is not enacted by the legislature, it is deemed to repose in the notions of justice, equity and good conscience, which themselves may have to be sought out of the mental archives of judicial tribunals in England. Two classes of dispositions of property formed exceptions to the latter group of subjects, and were not made subject to the unifying process. Gifts or grants without consideration and charitable or religious endowments, are ordinarily permitted to be governed by the special personal law applicable to the donor or endower.

At our starting point—fifty years ago—we had on the Benches of the High Courts in India two distinguished Muslim Judges, Syed Ameer Ali and Syed Mahmood. Their intellects were of very different textures and calibres, but they were at one in their sensitiveness to the historical back-ground of Muslim law, and to a reverential attachment to the great principles underlying the legal system of Islam. Both were also possessed of a determination to

hold their own against any assumptions that the systems of law in the East (even though they should be ancient) must necessarily be inferior to European systems. Such assumptions were natural on the part of those other members of the Bench, who were less well informed in this connection. It has been observed by a great Eastern aphorist that branches bearing a weight of fruit are apt humbly to bend down low to the earth: men whose heads have to carry a load of learning are ordinarily apt to be modest; though there are, it must be admitted, stalwart exceptions. Those, on the other hand, who are not handicapped with such loads, are inclined to think that no institutions or notions with which they themselves are unfamiliar, deserve respect. They bask in the confidence that whatever is beyond the effortless grasp of their own intuitive powers, whatever is difficult of appreciation without research, must straightaway be thrust down into the Hades provided for all absurd conceptions. Syed Mahmood and Syed Ameer Ali played the part of Hercules to many an Alcestis who was sought too hastily to be consigned to that Hades.

In respect of the general principle of the operation of Muslim law in India, perhaps the most interesting feature was the attitude that the Courts took up with regard to the proof of custom when it attempted to vary the law of Islam. The question arose first in Bombay where the Khojas and Memons had continued to follow the Hindu law of inheritance and succession, in spite of having adopted Islam. Inheritance is the subject on which the Quran itself lays down the law more fully than on any other subject; and custom could not have come into collision with the written law more radically or more categorically than it did in the case of these two communities. But the Court held, that there being no established religion in India, it was not within the Court's province to lay down that there can be only one correct interpretation of the law of Islam, and that that one interpretation shall be determined by itself. It was

therefore held that the course of conduct customarily adopted by the members of these and similar communities must be recognized and enforced.

In the North a distinction was at one time drawn between cases governed by enactments requiring customs to be enforced, from cases governed by enactments requiring Muslim law to be enforced without expressly providing for preference being accorded to custom. But on the matter going up to the Privy Council it was decided that custom may be proved and enforced whether or not it is expressly provided that it shall be enforced.

In 1937 the Shariat Act was passed. Under it, in respect of questions regarding ten stated subjects the personal law (Shariat) must be enforced notwithstanding any custom or usage to the contrary—questions relating to agricultural land being saved and left subject to variation by custom. The Act consequently dealt a severe blow to custom varying law. But even previous to the passing of the Act, several decisions both of the High Courts and the Privy Council had emphasized the necessity for strict proof of custom, and disapproved of inferences and fresh rules being drawn and derived from customary rules : points on which earlier decisions in India had not always taken a firm stand. In this latter respect customs differ fundamentally from law.

The Shariat Act shuts custom out altogether from large fields of law. Fears have been expressed that this will prevent the natural modification of Muslim law and will have the effect of perpetuating antiquated rules obnoxious to modern needs. These apprehensions seem however to be unjustified. Custom, so far as it affected Muslim law, usually tended to nullify, or at least to minimize the effects of the reforms introduced by the Prophet. Custom in many cases provided a loophole for sliding back to pre-Islamic harshness against women and the weak in opposition to the injunctions of Islam. Thus the Hanafi law of divorce would greatly improve if the strict law of Islam could be brought into operation.

Unfortunately the Hanafi texts themselves in respect of divorce have succumbed to the good old rule, the simple plan : and have deserted the higher ideals indicated by the Prophet.

Then again it would have been more in accordance with the texts if custom had not been allowed to encourage the tendency towards the superstitious worship of saints and of tombs. Many ceremonies purporting to be religious, but calculated to bring incidental profit to their organizers would be effectively discountenanced if they had to be supported upon the texts. The Shariat Act has on the contrary saved custom regarding charitable and religious endowments and institutions ; and it is very possible that dargahs will be able to flourish and multiply under the guise of charities and religious endowments.

The Muslim law of inheritance is so complete and logically worked out that hardly any cases relating to that branch of the law have been brought before the Courts. On other subjects many decisions are reported and in the majority of cases the law has steadily broadened and developed. The way in which the law of Islam has originated, renders it peculiarly susceptible to such development. Much of it owes its origin to institutional expositions by great text-writers who were capable of giving expression to wide and liberal views. The decisions of famous Qazis learned in the law as well as experienced in the practical requirements of life, have also played great part in moulding it and shaping its rough hewn ends. The option to the Court to adopt that one of several dissenting views which will work most equitably in the particular instance, furnishes a seed of the utmost fecundity. If this seed were duly valued and cultivated, no question would be left without an equitable solution.

What has been stated above in general terms could be illustrated by many interesting instances. The question has for example been raised by husbands whether an agreement on their part in marriage contracts that the

wife shall be permitted to live with her parents is void. Having induced the wife to marry on this condition, the husband, after the marriage has been contracted, suffers from qualms of conscience whether he would not be acting against public policy if he acted according to promise and permitted the wife the liberty she stipulated for. The decisions of the Lahore High Court on this point have soothed the after-awakened conscience of the husband : but so far as the wife is concerned, they have been very harsh. They have not gone unquestioned by modern text-writers and seem to be against the ancient authorities and the tendency of decisions of the Privy Council. It is more than possible that the ultimate decision may hold that the stipulation in question is not opposed to public policy and that the husband shall be bound to perform his covenant, since the Quran is insistent on the duty of fulfilling one's promises.

Controversies in regard to dispositions of property have been more complex as well as more bitter. Waqfs in favour of the members of the waqif's family had been held to be void. Those decisions were opposed to the texts but were based on a desire to make the Muslim law conform to the rule against perpetuities, moderating the effect of that rule by exceptions in favour of charities and religious endowments. The Waqf Acts have brought back the Muslim law as enforceable in India to the original texts.

With regard to life-interests under Hanafi law we seem at last to be emerging into light. On this subject the Muslim law has been hindered from developing along right lines for two-thirds of a century. In 1872 the Privy Council observed in reference to a particular disposition that it "did not seem consistent with Muhammadan usage ; and that there ought to be very clear proof of so unusual a transaction." This was interpreted as laying down that however clear the proof may be of such a transaction or of any similar transaction having been intended, the disposition cannot be allowed to have effect. This distorted view of the observation was supported by

passages from the original authorities torn from their context and entirely misinterpreted. In the result a rule was derived that if a Hanafi Muslim intended to create a life-interest, the donee in whose favour such an interest was sought to be created, acquired the absolute ownership of the property in which a bare life-interest was intended to be granted: however clearly and emphatically the donor's intention may have been expressed to give a life-interest and no more, and however solemnly the donee may have agreed to claim no more. This startling proposition was finally rejected by the Privy Council as recently as 1929, when they held that if a life-interest is intended, the donee will either take a life-interest—if life-interests are recognized in Hanafi law—or if they are not recognized then the disposition will fail altogether and not expand into a full interest: *Amjad Khan* v. *Ashraf Khan*[1]. Decisions of the High Courts have since held—though not without a dissenting judgment in the Bombay High Court—that a Hanafi Muslim may create a life-interest. The dissent was expressed in spite of an earlier decision of the Privy Council in which also the name Amjad (there spelt Umjad) was prominent ; and in which it was held that the donor having made a gift of Government promissory notes, could reserve to himself a life-interest in their recurring interest: *Nawab Umjad Ali Khan* v. *Mt. Mohumdee Begum*[2]. In this way in effect a life-interest in the subject of gift can be created . No great conveyancing skill is needed to make the person in whose favour the life-interest is sought to be reserved, the donor.

The Privy Council on most occasions, the Courts in India on many, and the Legislature on the occasion when it enacted the Muslim Dissolution of Marriage Act (VIII of 1939) have interpreted Muslim law with a breadth of vision, auguring well for a continued development of the law in such a manner as to make it adequate for all modern needs.

1. (1929) 59 I A. 223 2. (1857) 11 Moo I.A 51[?].

HINDU LAW OF INHERITANCE : NEED FOR DEFINITENESS

BY

SIR VEPA RAMESAM

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One of the first essentials for the peaceful progress of the citizens of any country is that its laws should be definite and easily ascertainable. In the case of many branches of the law, such an ideal is very rarely attainable or is attained only with great difficulty. At least as to one branch, no excuse can be permitted, because the required definiteness of law is urgent. This is the law of inheritance. However much a person may avoid any need to know other branches of law, a knowledge of this branch cannot be dispensed with, for all men are mortal. As Romilly, M.R., said " Death is the most certain of all events."

Now Hindu Law has been administered by the British Courts for varying periods in the different provinces, roughly for about 140 years in most parts of British India and yet it is a sad fact to contemplate that the state of the law of inheritance as applicable to the Hindus is still not quite settled. This Law may roughly be divided into two branches—(1) that relating to sagotras and (2) that relating to bhinna-gotras or bandhus. In Bengal there is no such sub-division. The two categories of heirs are intermixed and on the whole it may be said that the law is fairly settled in that province by a series of decisions decided so long ago, as in the time of Justice Dwarka Nath Mitter, so that, most of my remarks apply only to those provinces which are governed by the Mitak-

shara. In those provinces, the above sub-division applies.

Taking up the case of sagotras though three very important points, *viz.*: (1) whether the brother's grandson comes before a grandmother, (2) whether samanodakaship extends beyond 14 degrees, and (3) whether the distinction of whole blood and half-blood extends to sapindas remoter than brothers and brothers' sons—are all recently settled by the Privy Council, there are still points which are not clear and which have to be made clear, though they may not be of frequent occurrence. Referring to the table at Mulla's Hindu Law, 9th edition, p. 32 the question of priority may arise between *X* 6 descendant of *F* 1 and *X* 4 descendant of *F* 2 and while it may be said that *X* 6 is remoter in the number of degrees, it may be said in his favour that he is descended from a nearer ancestor. The last suggestions made by the Editors at the end of paragraph 43 (page 44) show that there is still something to be settled in this branch of the law.

When we come to bandhus, the matter is more serious. We have at present two points on which conflicting opinions have been pronounced by the Madras and Allahabad High Courts. The first point is the subject of the decision in *Gajadhar Prasad* v. *Gauri Shankar*[1]. According to this decision which bears obvious traces of the influence of Sarvadikari's tables, a daughter's daughter's son's son, a daughter's son's son's son, a daughter's son's daughter's son, and a daughter's daughter's daughter's son of an ancester common to the propositus and the claimant are not heritable bandhus. The Madras High Court has come to an opposite conclusion in *Kesar Singh* v. *Secretary of State*[2]. It must be remembered that the four instances mentioned above fall within the definition of the bandhu as settled in *Ramachandra* v. *Vinayak*[3], as they are all within 5 degrees of the common ancestor. A

1. I.L.R. 54 All. 698. 2. I.L.R. 49 Mad. 652.
3. I.L.R. 42 Cal. 384.

second point of difference was the subject of decision in *Brijmohan* v. *Kishanlal*[1]. Whether the non-reporting of this important decision in the Indian Law Reports is an indication of the opinion of the Law Reporting Committee of Allahabad about it, it is difficult to say. Mr. Justice Venkatasubba Rao in the case already referred to has expressed a contrary opinion, *viz*., that where a claimant claims through his father, bandhu relationship extends to 7 degrees and provided care is taken to exclude all sapindas by frog's leap, such a view gives rise to no difficulty or anomaly. In all the texts cited in the different parts of the judgment in *Ramachandra* v. *Vinayak*[2] by the Rt. Hon'ble Mr. Amir Ali, it is expressly stated that in the case of a claimant through a father sapindaship extends to 7 degrees and in the case of a claimant through a mother to 5 degrees. There is nothing in the judgment to indicate that the first half of this proposition was intended to be dropped or regarded as obsolete and that a uniform rule of 5 degrees was intended to be adopted. It is difficult to shake off the conviction that in the final conclusion, 5 degrees was stated as the limit of sapindaship somewhat inadvertently and because in the particular case it is the limit of 5 degrees that applies.

But besides the two points stated above, there is a third point which is the subject of decision by the Patna High Court in *Uma Shankar* v. *Nagesvari*[3]. This judgment is a very unsatisfactory judgment, because though it is a judgment of five judges, both the Indian Judges on the Bench have dissented. Though the Madras High Court has not actually decided the point, an opposite tendency, *i.e.*, to exhaust the nearer line before going to the more remote, appears in *Balusamy* v. *Narayana*[4] and *Kalimuthu* v. *Amma Muthu*,[5] (*vide* paras. 53 and 53-A of Mulla's Hindu Law).

Besides the above three points, there are further difficult questions as to bandhus, *i.e.*, as regards bandhus

1. A.I.R. 1938 All. 443.
2. I.L.R. 42 Cal. 384.
3. 3 Pat. L.T. 663.
4. I.L.R. 20 Mad. 342.
5. I.L.R. 58 Mad. 238.

beyond 4 degrees. As to this the question arises whether the sub-division of bandhus into three classes :—Atma Bandhus, Pitri Bandhus and Matri Bandhus as laid down in *Muthuswami* v. *Muthu Kumaraswamy*[1] is really exhaustive. It is clear that the Privy Council could not have discussed the point keeping the case of remoter bandhus in their minds. (*See* para. 54-A of Mulla's Hindu Law.) Other points may also be referred to. But the above four instances suffice to show the uncertainty in which the Hindu Law of Inheritance at present stands. The consideration that these difficulties are not of frequent occurrence is irrelevant. The Law of Succession ought to be certain and capable of being worked out with mathematical precision. When we compare this state of things in the Hindu Law with the English Law of Succession, as explained in Steven's commentaries, one can see what a sad case of uncertainty the Hindu Law presents. The Parsees have got their law made definite in an enactment; so also the Indian Christians in the Indian Succession Act. Then why not the Hindus ? The whole subject ought to be investigated by a Committee and an Act passed to settle it. I am not pleading for one view or the other about the matters in controversy. But I am pleading for definiteness.

Again in a matter like this piecemeal legislation is not desirable, though one may forgive the passing of Act II of 1929 on account of the urgency or importance of the particular case dealt with. That Act was intended to be an exception to the general principle that all bandhus, however near, should be excluded by sagotras, however remote. But besides that exception, which is certainly intended it is also an exception to another principle relating to bandhus, namely, that all males should be exhausted before females come in. In Act II of 1929 the sister comes before sister's son and son's daughter before son's daughter's son and daughter's daughter before daughter's daughter's son. It is true that something may

1. I.L.R. 19 Mad. 405.

be said to defend the provisions of the Act and I am not to be understood as attacking it. But the provisions rest on no principles and are obvious exceptions to well-recognised rules. It is in that sense that the Act is unsatisfactory. Anyhow I do not see any reason why the other male descendants of a propositus such as son's daughter's son, daughter's son's son and daughter's daughter's son—all cases of occasional occurrences should not also be covered by the Act and placed before the sister or sister's sons. (Vide *Kalimuthu* v. *Amma Muthu*[1].)

With commendable chivalry attempts are being made to settle the question of women's rights by the appointment of a Committee. Why not a similar Committee be appointed to settle all vexed questions in the Law of Succession particularly that which relates to bandhus? The whole country will welcome such a Committee.

1. I.L.R. 58 Mad. 238.

HINDU LAW : JUDICIAL VALOUR AND PROGRESSIVE LEGISLATION

BY
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I have read somewhere of judicial valour and the phrase is stamped on my memory. Its full import will become clear, if it be remembered that society is constantly changing, and that law without power of continuous adaptation, is an effete and inert thing. This is more true of common law than of statute law, the former being more flexible than the latter. In statute law, there is no doubt fixity of words but not of interpretations, which must change with changes in the environment, not foreseen by the legislature. But it is with Hindu Law I am at present concerned, which like the common law of England, possesses a surprising capacity for adaptation. That a judge should be guided by conceptions of what is socially desirable, has been voiced by an array of eminent men in modern times whose names would make an impressive list.[1] It is far more important, says a writer, that a Judge should be a prophet of the future than a trustee of the past, and he goes on to say that in the power of holding the scales evenly between the claims of the past and those of the future lies his supreme merit. The underlying idea is this : Law being an expression of life itself and life being subject to change, a judge while conforming to the law should adapt it to the changed

1. Aldous Huxley, "Proper Studies"; Bryce "Studies in History and Jurisprudence" II, p. 349; "The Law" by Lord Justice Sir Henry Slesser, p. 17; Justice Cordozo "Nature of Judicial Process" p. 141; Robson "Justice and Administrative Law" pp. 241, 245 and 241; Coleridge in "Table Talk" quoted in 1940 (1) M.L.J. p. 109 (Journal).

conditions. But there is nothing peculiarly modern or western in this view, for, our forefathers no less than the moderns, had a proper sense of what the dynamics of life required, in regard to the law being in conformity with the age. Parasara conceiving time as was then the vogue in terms of Yugas, declares[1] that the Dharmas for men laid down for the four Yugas are different, " the Dharma of each Yuga being in keeping with the distinctive character of that age."

On this Viramitrodaya's comment is significant, for, he observes that the Dharma prescribed by Manu Smriti was not for men of the inferior calibre of the Kali Yuga; in that sense Parasara considers himself superior, as what he formulates is such as men of Kali Yuga can perform.

The meaning is clear. The law designed for godly men in a golden age is unsuited to men of common clay. For instance, Jeshtabaga being " abhorred by the world " would not win Vignaneswara's favour though found in the Shastras.

Nothing daunted, our forebears were prepared, if need be, to brush aside even the Veda[2] (the Sruti), self-revealed and self-sufficient. At the earliest stage the primacy[3] of the Veda was recognised ; next, in case of conflict between Sruti and Smriti option[4] was given to follow either ; a further stage[5] was reached when Smriti was allowed in certain matters to override Sruti, and ultimately Nibandhas and commentaries were prepared to overrule even Smriti.[6] I refer to this to show that unquestioning submission to authority however venerated, was in the past alien to our genius.

It is inspiring to think with what virility of mind the old law-givers addressed themselves to the task of inter-

1. I. 22 ; I. 24.

2. *Cf.* the Vedic Story of Sunasepha's adoption by Visvamitra already having one hundred sons.

3. *See* Sabara (1st Century B.C.).

4. *See* Kumarila (7th or 8th Century A.D.).

5. Compare Viramitrodaya which states that Vedic injunctions as to performance of Agnihotra, entering into Sanyasa, etc., are prohibited by Smriti texts.

6. *E.g.*, Unequal partition.

pretation. With an insight and subtlety scarcely surpassed, they wrested from the Smritis rendered semi-sacred by tradition, such meaning as would accord with their own view of justice and right, and while treating the text with seeming deference thought no interpretation too daring or revolutionary. The Hindu Women's Rights to Property Act (1937) is a fine tribute we of this generation have paid to the courage and vision of the Seers of the past, Visvarupa[1] and Jimutavahana[2]. That ancient jurists made the same texts the basis of two dissimilar systems of succession, the one individualistic, the other corporate, proclaims their intellectual audacity. The revolutionary enactment of 1937 which has made the law of Jimutavahana in certain vital respects the law for the whole land is a notable measure not only because it signifies the triumph of liberalism, but because—what is relevant to my purpose—it testifies to the sense of realism of the master minds in the past.

The Mitakshara in the matter of joint family system worked oppressively and was a buttress of conservatism. Under repeated onslaughts by the Privy Council its rigours were mitigated slowly but gradually. Creditors have been allowed to attach a coparcener's share for his separate debt and the purchaser of the share can even claim partition. A coparcener can mortgage or sell his undivided share in coparcenary property. The system was all but strangled when it was held that unilateral declarations can disrupt a joint family. Then to the aid of the Judges came the legislature by passing the Act of 1937. The coparcenary system is now at its last gasp and it remains for the legislature by a bold measure to sound its death-knell. Then we shall have reached what Jimutavahana had achieved ages ago. The evolution of coparcenary law is the supreme example both of judicial valour and the adaptability of Hindu Law.

1. Provides *inter alia* for widowed daughter-in-law: "if equal shares are allotted by the father, the widows of his sons and grandsons and his own wives to whom no Stridhana has been given by their husband, or father-in-law or himself should be made partakers of their husband's share."

2. Right by birth; survivorship.

Through judicial decisions Hindu Law has in several respects met the challenge of the times. An alien (a non-Hindu) may through conversion be received into the Hindu fold. An apostate can become a reconvert to Hinduism. Harijans are not only an integral part of Hindu society but can be votaries of a particular Hindu sect. Anuloma[1] marriages have obtained sanction. Surely the judges in thus adjusting law to environment have not transgressed, but had their decisions been otherwise disintegration would have overtaken Hindu society in these dynamic days.

But there has been a retrograde tendency in certain matters, and with one of them that stands out I shall deal. The rule of limited estate, the greatest single obstacle to emancipation of Hindu women has been needlessly engrafted on Hindu Law. This is a gift by the Privy Council to the forces of conservatism and has caused incalculable harm to Hindu society. Let me examine if there is any basis for this doctrine.

Yagnavalkya's text runs thus :

" What was given (to a woman) by the father, the mother, the husband or a brother or was received by her at the nuptial fire, as also which was presented to her on supersession, or any other (*Adyancha*) is denominated Stridhana."

Vignaneswara explaining the text interprets the word *Adya* as follows :

" And as indicated by the word *Adya*—any other—also property which she may have acquired by inheritance, purchase, partition, seizure or finding are denominated by Manu and the rest 'Stridhana.' The term 'Stridhana' conforms in its import with its etymology, and is not technical ; for if the literal sense is admissible a technical acceptation is improper."

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1. (*a*) Nor does Hindu Law really forbid Pratiloma marriages.

(*b*) Why should Sagotra or Sapravara marriages be prohibited? What a travesty to forbid an alliance, say, between Brahmin families of Madras and Kashmir on score of identity of Gotra!

Referring to Manu's enumeration of Stridhana property Vignaneswara proceeds :

" The enumeration of six sorts of woman's property by Manu (" what was given before the nuptial fire, what was presented in the bridal procession, and what has been bestowed in token of affection or respect and what has been received by her from her brother, her mother or her father are denominated the six-fold property of a woman ") is intended, *not as a restriction of a greater number, but as a denial of less.*"

Here is a discerning comment of Vignaneswara on Manu's text, in keeping with the true canons of construction. This view of the commentator at once just, liberal and correct, was unfortunately rejected by the Privy Council. Their reasons, with great respect, are hardly adequate. The whole of the Mitakshara was not then before their Lordships and it was feared that restrictions might be found in some other parts of the work. That reason does not hold good to-day, as we know that in fact no such passage, as was apprehended, exists. The Privy Council prefers Smriti Chandrika, Dayavibhaga and divers other works to Mitakshara. But is not Vignaneswara according to this very tribunal an ascetic from whom nothing can emanate at variance with the religion of the Hindus ? Then there is the theory of presumed incapacity or perpetual tutelage of the Hindu woman. Is this not an exploded myth ? Has not this archaic rule been more honoured in the breach than in the observance ?[1] The pandits were consulted and their Lordships refer to the startling differences of opinion among them. If so, why should the illiberal view have been preferred, especially in the face of the considered opinion of Vignaneswara ?

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1. (*a*) Minor widow is allowed to re-marry. (*b*) A widow can disregard her husband's command to adopt. (*c*) A woman can change her religion without incurring forfeiture. (*d*) In Bombay females succeeding to females or females born in the family can inherit with absolute rights. (*e*) In Mithila a childless widow succeeds to her husband's moveables and can even bequeath them by will. (*f*) A widow can make a complete surrender of her life estate. (*g*) She can succeed to and hold an impartible estate.

The view of their Lordships is also opposed to principle. The doctrine of limited estate is applied to inherited property, the rule being one of reverter, that the property on the death of the taker returns to the original owner, whether male or female, to whose heirs it again descends. By parity of reasoning, what applies to inherited property must equally apply to property acquired by purchase, partition, seizure or finding, for according to Vignaneswara all these five modes are included in the word '*Adya*', inheritance being on a par with the other four indicated modes. Is it ever suggested that the property acquired by, say, seizure or finding is subject to that rule? Indeed it is, in the very nature of things, incapable of application, for who can be deemed reversionary heirs to such property?

There can be no true analogy between restrictions on alienation found in some texts and the theory of limited estate. Such inhibitions again are not confined to females, there being restrictions imposed also on males and even as to their self-acquired property—the latter being treated as moral injunctions and not as rules of positive law. The doctrine of limited estate is thus a pure creation by judicial decisions unsupported by ancient Shastra.

In the realm of Hindu Law, this rule more than any other has produced grave social injustice. Kinsmen of all sorts swoop down, goodness knows from where, to clutch at the property, and this not only on the death of the woman, as reversioners are permitted by law to harass her even during her lifetime. There is no class of suits which shock a judge's sense of justice more than suits by reversioners. To mitigate the evil, rules of evidence have been relaxed to protect transfers by Hindu women and the doctrine of necessity has been greatly stretched. Nevertheless how many titles (some even of sixty or seventy years' standing) have had to be upset and how many homes have been wrecked ! To what unending

litigation, chicanery and subterfuge does this rule not lead !

I have heard the fossilized state of Hindu Law being imputed to the Privy Council, but this is a facile criticism from which I must strongly dissent. Such critics forget that the present-day Hindus, in reversal of their great tradition, fight shy of every change, as if there is no custom or usage or law not linked up with religion. On the Privy Council have sat some of the best legal minds, who have striven, and with admirable success, to master the intricacies of an alien system, and in view of our deep-rooted conservatism they have had delicately to thread their way.

How to adapt Hindu Law to suit the environment, that is the supreme question. Through judicial decisions, no doubt, is one method, but that is tardy, and judges after all can function only within the framework of authority, precedent and tradition. The more direct and safer method is through legislation. Already far-reaching changes have been effected by piecemeal legislation, but the Hindu Law is a living organism and if you desire a coherent pattern[1], comprehensive legislation is the only right approach.

1. Subsequent unchastity does not entail forfeiture (Hindu Law), Conversion does not (Statute) but re-marriage does (another Statute) !

COVENANTS TO PAY AND SUBROGATION IN MORTGAGES

BY

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It is proposed in this article to deal with two questions which arise with reference to subrogation in mortgages ; (1) the position of a person paying off a mortgage under a covenant, and (2) the position of a purchaser or mortgagee paying off a mortgage out of the purchase-money or mortgage-money.

With reference to the position of a person paying off under a covenant it is settled law that where there are two mortgages on a piece of property and a purchaser purchases the property with a covenant to pay off both the mortgages, if he pays off only one he cannot, as against the subsequent mortgagee, keep the mortgage paid off alive and claim subrogation. That is to say, if property *X* is mortgaged to *A* and then to *B* and if *P* purchases *X* from *M*, the mortgagor, with a promise to pay off both *A* and *B*, if *P* pays off only *A*, as against *B* he cannot claim to be subrogated to the mortgagee *A*, *Govindasami Thevan* v. *Doraiswami Pillai*[1], *Malli Reddi Ayya Reddi* v. *Gopalakrishnayya*[2], *Lakshmi Amma* v. *Sankaranarayana Menon*[3].

But suppose the purchaser promises to pay off only one mortgage, can he in such a case claim subrogation or not ? *P* in the above case promises to pay off *A* only and pays off that mortgage. Can he as against *B* claim to keep that mortgage paid off alive ? Obviously he

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1. I.L.R. 34 Mad. 119.
2. I.L.R. 47 Mad. 190 (P.C.)
3. I.L.R. 59 Mad. 359.

should not be allowed to do so if the principle is ' where there is a covenant there cannot be subrogation ,' and the question we have to examine now is how far this statement of principle is correct.

The better opinion seems to be that such a purchaser should not be allowed subrogation, the reason being that if a person undertakes an obligation he should not be allowed to claim any special reward for discharging that obligation. The principle, it is submitted, is clearly deducible from the leading case of *Gokaldas Gopaldas* v. *Pooranmal*[1]. In this case an auction-purchaser of property subject to two mortgages paid off one mortgage. There was no undertaking to pay off either of those mortgages. As against the second mortgagee the purchaser was allowed to keep the first mortgage paid off alive and the reason given by the Privy Council is that the purchaser had paid off that mortgage without any obligation to do so. It follows from this that where there is an obligation to pay there cannot be a claim to keep the mortgage paid off alive.

The language used by the Privy Council precludes the idea of any reference to the second mortgagee. " In the case before their Lordships," says Sir Richard Couch in his judgment on page 1044 " the debt to the Bank was not paid off out of the purchase-money. The appellant purchased the interest of the mortgagor only and did not in any way bind himself to pay off *that debt.* When he paid the bank, some six months afterwards, it was not because he was under an obligation to do so."

It is clear that the debt referred to is the debt to the Bank, the first mortgagee, and the obligation contemplated is an obligation to pay off that first mortgagee ; and it follows therefore that if there are two mortgages on one item of property and the purchaser promises to pay off the first and pays that off, he would not be entitled to subrogation as against the second mortgagee. The language of the Privy Council is definite and unqualified

1. I.L.R. 10 Cal. 1035.

and it is difficult to understand how, with this statement of the Privy Council before us, it is possible to suggest that it is only if there is an obligation to pay off the second mortgage also that the rule where there is a covenant there cannot be subrogation can apply.

It may be asked at this stage how this view, that there cannot be subrogation if there is a covenant to pay, can be reconciled with the doctrine of intention as stated in the leading case of *Thorne* v. *Cann*[1]. Lord Macnaghten, in this case, says : "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." How, it may be asked, considering that the purchaser is not one personally liable to pay, can the presumption of intention for his benefit be excluded ? The answer to this is that, although it is no doubt true that the mortgagee cannot sue the purchaser on the covenant, still the conception of liability in Equity is wider than that of the Common Law, and when the purchaser is asking for an equitable relief, *viz.*, subrogation, he cannot claim any special consideration when he merely discharges a covenant and performs an obligation which he undertook with the mortgagor to perform. Subrogation is based on equity and natural justice, and whether the covenant is enforceable at law or not there can be no claim in equity to any relief in such cases. It may also be remembered that from the point of view of equity, a purchaser of the equity of redemption who promises the mortgagor to pay off a mortgage is in the same position as the mortgagor himself. The mortgagor is not allowed subrogation because he is personally

1. (1895) A.C. 11 at 18.

liable to pay off the mortgage, and when the purchaser, by covenant with the mortgagor takes on this duty, equity cannot see any difference between him and the mortgagor, and therefore it is that a purchaser with a covenant is treated exactly in the same manner as a mortgagor and denied the right of subrogation.

The decisions of the Madras High Court which cast doubts on the above statement of the law are (1) *Lakshmi Achi* v. *Narayanaswami Naicker*[1], (2) *Lakshmi Amma* v. *Sankaranarayana Menon*[2] and (3) *Srinivasalu* v. *Damodaraswami*[3].

In the first of these cases, in reply to Mr. Varadachari's argument that a covenant should exclude subrogation, Mr. Justice Ramesam says as follows: "It is unnecessary to deal with the contention of Mr. Varadachari that wherever there is a covenant by the vendee to pay off a prior debt of the mortgagor there can be no priority in respect of it. The authorities relied on by Mr. Rajah Iyer, *Satnarain Jewari* v. *Chowdhuri Sheobaran Singh*[4] and *Chidambara Nadan* v. *Muni Nagendrayya*[5], show that no such broad proposition can be insisted on and it is safer to rest the decision in each particular case on the particular intention in that case derived from the facts and not upon any general formula of that kind."

Let us now have a look at these two cases cited by Mr. Justice Ramesam. In the Calcutta case, *Satnarain Jewari* v. *Chowdhuri Sheobran Singh*[4], the facts shortly stated were as follows:—A property was subject to two mortgages and a third hypothecation. The property was sold and only a small portion of the consideration money was paid to the owners, the balance being retained by the purchasers for payment of the several encumbrances. The first two mortgages were paid off and the purchaser claimed the right of subrogation as against the person who was entitled to the hypothecation. Mookerjee, J.,

1. I.L.R. 53 Mad. 188.
2. I.L.R. 59 Mad. 359.
3. (1938) M.W.N. 708.
4. (1911) 14 C.L.J. 500.
5. (1920) 12 L.W. 393.

held he was entitled to do so. It is difficult to understand this decision in view of what, as we have already noticed, was laid down in *Gokuldas's* case. The two reasons mentioned in that case in allowing subrogation to the purchaser of the equity of redemption were (1) he was not under an obligation to pay the first mortgage and (2) the mortgage was not paid off from out of the purchase-money. Both these conditions were present in the Calcutta case—the purchaser promised the mortgagor to pay off these two mortgages and retained sufficient money for that purpose. The decision therefore should have been that he was not entitled to subrogation and the Madras High Court ought to have dissented from it. The learned Judge in the Calcutta case states the principle correctly, on p. 505 when he says ' the principle is that a person cannot claim subrogation when he simply performs his own obligation or covenant.' But he goes on to say, ' the case before us is manifestly of an entirely different description.' It is impossible to see from the facts as reported, how this case can be of an entirely different description. In the other case, *Chidambaram Nadan* v. *Muni Nagendrayya*[1], the question to be decided was whether a subsequent encumbrancer who paid off a prior mortgage from out of the mortgage money in accordance with the directions of the mortgagor was entitled to keep the mortgage paid off alive. It was held that he would be so entitled. The judgment refers to the leading case of *Mohesh Lal* v. *Mohant Bawan Das*[2], where the Privy Council laid down that when a mortgagee is directed to apply the loan in discharge of a prior mortgage the presumption is that the payment is to be regarded as primarily the payment of the mortgagor and that his interest can only be to extinguish the first charge. The person paying, *i.e.*, the mortgagee, is treated as the agent of the mortgagor whose money it is that is utilised for the payment and therefore the Privy Council holds that the intention should be to extinguish the prior security. This case is

1. (1920) 12 L.W. 393. 2. I.L.R. 9 Cal. 961. (P.C.).

however distinguished by the learned judges and they seem to think that such a general statement would be in conflict with *Gokaldas's case* (*vide* p. 896).

This is hardly convincing because *Gokaldas's* case is clear authority for the proposition that if the purchaser of the equity of redemption utilises the purchase-money for paying off a prior mortgage he would not be entitled to subrogation. The first reason given in that case for allowing subrogation was that the debt was not paid off from out of the purchase-money and it follows therefore that if a mortgagee pays out of the mortgage-money, on the same reasoning, he would not be entitled to subrogation. *Mohesh Lal's* case says the same thing when it states that the test is 'whose money is it?' When a mortgage is paid from out of the mortgage money advanced by a third mortgagee, it is the money of the mortgagor which is utilised for payment and if the mortgagor, when he pays off a mortgage with his money is not allowed subrogation, any other person who pays off with that money cannot be in a better position. There is therefore no conflict between *Gokaldas's* case and *Mohesh Lal's* case and this Madras case, *Chidambara Nadan* v. *Muni Nagendrayya*[1] also must be deemed to be incorrect.

In the second case, *Lakshmi Amma* v. *Sankaranarayana Menon*[2], Mr. Varadachari as Judge, does not base his judgment on the general principle that 'where there is a covenant there cannot be subrogation.' In his judgment he seems to imply that unless there is a promise to pay off the mortgagee against whom the right is claimed also subrogation may be allowed. "It seems to me unaccountable" he says on p. 369 of the report, "that when referring to the Privy Council decision in *Ayya Reddi* v. *Gopalakrishnayya*[3], the learned judges should have lost sight of the express reservation made on p. 195 that the rule as to keeping alive the discharged mortgage for the benefit of the owner would not apply if the owner of the

1. 12 L.W. 393. 2. I.L.R. 59 Mad. 359.
3. I.L.R. 47 Mad. 190.

property had covenanted to pay the later mortgage debt. The decision in *Chidambara Nadan* v. *Muni Nagendrayya*[1] does not conflict with the decision in *Lakshmi Achi* v. *Narayanaswami Naicker*, because the right of subrogation was there recognised only as against a person whose debt the later mortgagee had not covenanted to discharge;" and the Madras Law Journal commenting on this case in its notes on Indian cases[2] observes :—" Their Lordships have laid down in this case that where the covenant is one the purchaser or mortgagee is to discharge the debt due to the encumbrancer whom he sought to postpone, such a covenant would prevent him from claiming priority over that encumbrance. The rule would therefore not apply where the covenant was only to pay some other mortgagee and not the mortgagee against whom subrogation is sought."

Let us now turn to the Privy Council case, *Ayya Reddi* v. *Gopalakrishnayya*[3], and see whether it is open to such construction and whether it limits in any way the rule as laid down in *Gokaldas's* case. The observation of the Privy Council on which this view is attempted to be based is given on p. 194 and it runs as follows : " It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. The rule would not apply if the owner of the property had covenanted to pay the later mortgage debt ...." How this extract can be construed to mean that in the absence of a promise to pay off a second mortgage, subrogation can be claimed against that mortgage even if a prior mortgage is paid off under a covenant is difficult to follow. The Privy Council is merely pointing out that it aggravates the crime if you

1. 12 L.W. 393.
2. 69 M.L.J. (N.I.C.) 31.
3. I.L.R. 47 Mad. 190.

have agreed to pay off the second mortgagee also. The major proposition is what is stated in *Gokaldas's* case—that you cannot claim subrogation if you are under an obligation to pay the mortgage which you want to keep alive. If however there is a promise to pay off the second mortgage also your position is worse and this surely cannot be considered as an exclusion of the major proposition. *Ayya Reddi's* case, therefore, does not qualify or limit *Gokaldas's* case at all. It points out that there can be no doubt with reference to the intention of the party in such a case, that he was to pay off, that is, discharge both the mortgages and in such a case it naturally follows that there can be no question of any intention to keep alive either of those mortgages. And this cannot be construed as leading to anything similar to what the commentator in the Madras Law Journal says as to the inapplicability of the rule where the covenant was only to pay some other mortgagee and not the mortgagee against whom subrogation is sought.

The same reasoning is seen in the Madras Weekly Notes case also : *Srinivasalu* v. *Damodaraswami*[1]. This case, however, deals directly with the second part of this article. But the following extract from the judgment of Mr. Justice Venkatasubba Rao shows that in the learned Judge's view also a covenant to preclude must be one to discharge the second mortgagee against whom the right of subrogation is claimed. On page 713 he says as follows :— " If a person buys for Rs. 10,000 property subject to two mortgages in favour of *A* and *B* agreeing to pay out of the consideration Rs. 6,000 to *A* and Rs. 4,000 to *B*, it stands to reason that if he pays off *A* alone he cannot have priority against *B*. For, the very essence of the transaction is that he makes himself liable to pay off both *A* and *B*, and by failing to pay off *B* he cannot be permitted to make any illegal profit of Rs. 4,000." He cites two Madras cases, *Govindaswami Thevan* v. *Doraiswami Pillai*[2] and *Lakshmi Achi* v. *Narayanaswami Naicker*[3] and says

1. 1938 M.W.N. 708 at 713.
2. I.L.R. 34 Mad. 119.
3. I.L.R. 53 Mad. 188.

that the above is the ratio of these cases. Mr. Justice Venkatasubba Rao goes on to refer to *Ayya Reddi's* case and gives the extract already mentioned where the Privy Council points out that the rule would not apply if the owner of the property had covenanted to pay the later mortgage debt.

Let us now turn our attention to the two cases mentioned and see what they lay down. *Lakshmi Achi* v. *Narayanaswami Naicker*[1] we have already referred to and no further comment is necessary on this case.

In *Govindaswami Thevan* v. *Doraiswami Pillai*[2], no doubt it is true that the purchaser of the equity of redemption had promised to pay off both the mortgages on the property. He paid off one and claimed subrogation, but in disallowing the claim, although the learned judges point out that the fact of his having promised to pay off the second mortgagee also was clear indication of his intention to discharge the mortgages, it cannot be said that this decision is authority for the proposition that subrogation can be claimed in the absence of a promise to pay the later that is the second mortgage debt. This is clear from a sentence which appears on p. 121 in this judgment. After referring to the facts of the case and holding that the intention to keep alive cannot be presumed because the object of the transaction was not to keep alive the mortgage against the future encumbrancer but to discharge the puisne encumbrancer as well, the judgment goes on to say " the rule as to subrogation only applies when the purchaser has not covenanted to discharge *the previous encumbrance.*" It will be noticed that use of the singular ' the previous encumbrance ' denotes that if there are two encumbrances and there is a covenant to discharge the first encumbrance, *viz.*, the previous encumbrance, the purchaser cannot claim subrogation when he discharges that covenant. This case therefore cannot be held to lay down that there should be a promise to the second mort-

1. I.L.R. 53 Mad. 188 2. I.L.R. 34 Mad. 119.

gagee before you can deny subrogation. The general principle therefore seems to be that wherever there is a covenant a person fulfilling that covenant cannot claim this equitable right of subrogation.

There is, however, one exception to this rule and that is where a fresh mortgage is discovered by the purchaser after his purchase. Suppose, for example, there are three mortgages, *X*, *Y* and *Z* on the property. The mortgagor mentions only *X* and *Y* and the purchaser purchases the property with a covenant to discharge these mortgages. Later on he discovers *Z*. In such a case, even though he covenanted to discharge *X* and *Y*, as between him and *Z* he would be allowed to keep these mortgages alive. The reason for this is apparent. The price paid by the purchaser would naturally be higher if he were told there were only two mortgages than the price he would have paid if he had been informed of the three mortgages. Now in such a case, therefore, the payment of these earlier mortgages should not be held to benefit the subsequent mortgagee. Suppose for example, *X* is for Rs. 250, *Y* is for Rs. 350 and *Z* is for Rs. 400, and the value of the property is Rs. 1,200. If the existence of *Z* is not disclosed to the purchaser he would pay for the equity of redemption Rs. 600. On the other hand if he knew of *Z* also he would pay only Rs. 200. Therefore when he pays this Rs. 600 for a property which is really worth only Rs. 200 it may be said that he has a claim as against *Z* to some consideration at the hands of equity and that is the reason why he is allowed to claim subrogation as against *Z* even though he was under a covenant to discharge *X* and *Y*. In *Har Shyam Chowdhuri* v. *Shyam Lal Sahu*[1], an earlier mortgage was not disclosed to the mortgagee and it was held that he was entitled to subrogation when he paid off that earlier mortgage although there was a covenant to pay off the subsequent mortgages which were disclosed to him, see also *Lakshmi Achi* v. *Narayanaswami Naicker*[2].

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1 I.L.R. 43 Cal. 69. 2. I.L.R. 53 Mad. 188 at 198.

Let us now look at the second question : whether a purchaser or mortgagee paying off a mortgage out of the purchase or the mortgage money can claim subrogation.

As far as the purchaser is concerned it is clear from *Gokaldas's* case that he cannot do so. Of the two reasons given by the Privy Council in allowing subrogation, one of the reasons is, as we have already noticed, that the mortgage was paid off not out of the purchase-money. This implies that if the auction-purchaser in that case had paid off the debt to the Bank from the purchase-money he would not have been entitled to subrogation. We have also noticed *Mohesh Lal* v. *Mohant Bawan Das*[1] where the Privy Council suggests that the test should be 'whose money is it?' The purchase-money belongs to the vendor. If the vendor had paid off the mortgage from this purchase-money he would not have been entitled to subrogation. Therefore if the purchaser pays off the mortgage with this money he would be acting as an agent of the vendor and he would not be entitled to subrogation. The same principle ought to govern the mortgagee also. If a mortgagee advances money to the mortgagor to enable him to pay off earlier mortgages, the money belongs to the mortgagor and because, if the mortgagor had paid he would not have been entitled to subrogation, the mortgagee also ought not to be entitled to subrogation. As Sulaiman, C.J., points out in *Hira Singh* v. *Jai Singh*[2], "In view of the observations of their Lordships of the Privy Council in *Mohesh Lal's* case, it is difficult to hold that the mechanical process of payment or the instrumentality of the person making the payment is the crucial test. The real test should be to whom the money belongs, which is paid. If the vendee or the mortgagee has taken the property and undertaken, as a part of the sale consideration or the mortgage-money, to discharge the prior debt, he is making the payment out of the money which really belongs to his transferor and he is not paying the money which belongs to himself."

1. I.L.R. 9 Cal. 961.
2. I.L.R. (1937) All. 880 at 895.

On this question also there are dissenting views expressed by the Madras High Court. *Chidambara Nadan's* case we have already noticed and there is no need to repeat our observations on that case. In *Srinivasalu* v. *Damodaraswami*[1] cited above, also there are observations against this view. Mr. Justice Venkatasubba Rao seems to think on the authority of two Privy Council decisions that even where a mortgagee pays off an earlier mortgage with the money advanced on the mortgage he would be entitled to subrogation. The cases relied on for this purpose are *Dinobundhu Shaw Chowdhury* v. *Jogmaya Dasi*[2] and *Mahomed Ibrahim* v. *Ambika Prasad*[3]. On the facts of these cases, however, such a view cannot be supported. In *Dinobandhu's* case there were two mortgages of 1885 and 1890. In 1891 there was an attachment and just a few days after the attachment the property was mortgaged to one *M* for Rs. 40,000 to enable the mortgages to be paid. The mortgagor had however agreed to hand over the earlier mortgage deeds to *M* and it is on this agreement that the Privy Council relies when it says that *M* should be entitled to be subrogated to the position of the earlier mortgagees paid off. On p. 165 of the judgment the Privy Council says, "Here the mortgagor was paying off his own debts but he was doing so for the benefit of Mustafi (*M.*) and in performance of the agreement with him." This case is not, therefore, authority for the proposition that whenever a mortgagee advancing money pays off an earlier mortgage with the money advanced he would be entitled to subrogation, but is authority for the proposition that he would be entitled to such subrogation if the mortgagor agrees to substitute him to those mortgages which are discharged by him. A similar agreement is inferred in the second case also, and but for such agreement the mortgagee lending the money would not have been entitled to claim that he should be substituted to the mortgages paid off. Again, it must be

1 (1938) M.W.N 708. 2. I.L.R. 29 Cal. 154.
3. I.L.R. 39 Cal. 527.

remembered as the Privy Council points out in *Mohesh Lal's* case, that if such a mortgagee is allowed subrogation that would really be giving him additional securities for the money already advanced by him. He has, when he advances the money one security, *viz.*, the mortgage given to him for his advance. With the same money, under directions from the mortgagor, he pays off the earlier mortgage. He cannot, in such circumstances, claim that earlier mortgage as additional security. If he is allowed subrogation the result would be that for one sum advanced he would be getting two securities: (1) the mortgage given to him, and (2) the earlier mortgage which he redeems with that money. This is certainly inequitable and that is the reason why he is not allowed to claim subrogation. On the other hand, if he pays off the earlier mortgage with his own money, that is something additional to what he had given the mortgagor, he would be entitled to subrogation.

Mr. Justice Lal Gopal Mukerji also differs from this view both in his book and in a Full Bench case over which he presided, *Tota Ram* v. *Ram Lal*[1], and seems to think that such a mortgagee ought to be allowed subrogation. He puts forward rather a novel point of view in the Full Bench case which seems to imply that the test, whether a mortgagee should be allowed subrogation or not, should depend on whether he has been over-generous to the mortgagor or not. This is what he says—" There does not appear to be any difference in principle between the case where a purchaser or a third mortgagee advances some money to the vendor or the mortgagor, as the case may be, and then pays off the first mortgage, and the case where the purchaser or third mortgagee professes to take the transfer for a larger sum than in the earlier case and keeps with him the money needed for paying off the earliest mortgage and actually does not hand over the money to the vendor or the mortgagor but uses the money to pay off the first mortgage." In other words, suppose

1. I.L.R. 54 All. 897.

there are two mortgages on the property for Rs. 200 and Rs. 300 and the property is worth only Rs. 1,000. Now suppose the purchaser pays Rs. 500 for the equity of redemption and later on from his own pocket pays off the first mortgage of Rs. 200. It is admitted that he would be entitled to subrogation. Mukerji, J., asks, suppose on the other hand instead of purchasing the equity of redemption for Rs. 500, the purchaser purchases it for Rs. 700 but keeps Rs. 200 with him and with this money he pays off the first mortgage, what is the difference between these two cases? The answer to this is—the difference is that the 200 rupees belongs to the mortgagor in the second case and therefore he should not be allowed subrogation. Similarly, when a mortgagee advances far more than he need have advanced, he ought to be satisfied with the security that he gets. Apart from this if generosity or over-valuation is the test how can any court decide whether subrogation should be allowed or not without going into the value of the properties? This would be introducing unnecessary complications into the law of mortgages, and this view therefore should be discarded.

The latest case of the Madras High Court dealing with this question is reported in *Vedantam Subbarayadu* v. *Chattapalli Lakshminarasamma*[1]. In an exhaustive judgment Mr. Justice Venkataramana Rao examines the principles relating to subrogation and states the following :—" The principle is this, that money received in consideration of a mortgage or sale of a property will be the property of the mortgagor or the vendor. *Prima facie*, therefore, the money that goes in discharge of the prior mortgage will be the money of the mortgagor or the vendor and therefore it will be payment by the owner in fee.... Where a mortgagor mortgages or sells a property for discharging a subsisting mortgage, whether the mortgagor discharges by receiving the money or the mortgagee or vendee discharges by covenanting to do so, retaining the consideration

1. 1939 M W.N. 952 . (1939) 2 M.L.J. 533.

money for the mortgage or sale, it will in either case be a discharge by the mortgagor. Where a mortgagee or vendee covenants with the mortgagor to discharge a particular encumbrance he assumes the duty of the mortgagor. *Prima facie*, therefore, as stated by Jones in his book on Mortgages, " if the money be paid by one who has assumed the duty of paying the debt either by contract with the mortgagor or with those who may have succeeded to this right, this must be taken as regards the other subsequent interests as a payment, and as the payment was in pursuance of the agreement it may be regarded as made with the mortgagor's money." This, it is submitted, is the correct view and, therefore, to this question also whether a purchaser or mortgagee paying off a mortgage out of the purchase-money or mortgage-money, should be entitled to subrogation, the answer must be in the negative that he would not be so entitled.

It may be noticed in conclusion that under the new law introduced by the Amending Act of 1929 a mortgagee advancing money with which an earlier mortgage is redeemed, if he wants to claim subrogation, must covenant for that right under a registered instrument, and in the absence of a registered instrument he would be denied subrogation. Under the old law the facts of each case had to be looked into to discover whether, as in *Dinobandhu's* case, there was an agreement or an intention to substitute the mortgagee with whose money the earlier mortgage is paid off to the position of this earlier mortgagee. Under the present law evidence of intention would be irrelevant because without a registered instrument such a right cannot be claimed at all.

The new section runs thus :

" A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated" (Section 92, clause 3).

We may conclude by pointing out that in enacting this new rule we are practically going back to the Roman Law, for in that law a mortgagee paying off an earlier mortgage with money advanced by him on his mortgage must specifically contract with the mortgagor for the right of subrogation.

"*Non omnimodo succedunt in locum hypothecarii creditoris hi, quorum pecunia ad creditorem transit. Hoc enim tunc observatur, quam is, qui pecuniam postea dat sub hoc pacto credat, ut idem pignus ei obligetur, et in locum ejus succeedat.*" (C. 8, 19, 1).

THE POSITION AND POWERS OF THE SPEAKER OF THE MADRAS LEGISLATIVE ASSEMBLY

BY

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The Speaker of a Legislative Assembly may be said to be the embodiment of the powers, the privileges and the dignity of the Assembly. The term 'Speaker' takes us back to the time in English parliamentary history when the holder of the office was the spokesman of the House of Commons, its *mouth*—to use the phrase commonly used in old parliamentary records. Sir Thomas More, the Lord Chancellor of Henry VIII addressing the Commons at the beginning of the Parliament of 1529-36 spoke as follows :

" And because you of the Commons House be a gross multitude and cannot speak all at one time :

" Therefore the King's pleasure is that you shall resort to the nether House and there amongst yourselves, according to the old and ancient custom, do choose an able person to be your common *mouth* and Speaker."

The Speaker was the person chosen by the Commons to give voice to their wishes to the King. The original function of the House of Commons was *consultative* and the chief function of the Speaker was expressive, to speak out. The Speaker listened to all that the Commons had to say, assimilated their ideas and then spoke on their behalf to the King. That is why he was called the Speaker. Herein probably lies the origin of the practice that even now all speeches in the House are addressed to him.

2. As the 'mouth' of the House of Commons, its Speaker lays claim at the Bar of the House of Lords to the "ancient and undoubted rights and privileges" of the Commons and especially that "their persons and servants be free from arrest and molestation, that they may enjoy liberty of speech in their debates, that they may have access to His Majesty whenever occasion may require and that all their proceedings may receive most favourable construction." He communicates the resolutions of the House, its thanks, its censures and its admonitions; and to the world at large he personifies in his person the House of Commons as a whole.

3. He is so completely treated as representing the House that any disobedience to or libel upon the Speaker or contempt of his authority is an offence committed against the whole House and punishable as a breach of privilege of the House. For offences against the privileges of the House committed in his presence, the Speaker of the House of Commons when accompanied by the Mace has the power to commit, without previous order of the House. In other cases, the House may resolve that the matter complained of is a breach of privilege either *suo motu* or after reference to the Committee of Privileges. The punishments inflicted by the House for breach of privilege are admonition, reprimand and imprisonment. The Speaker, as the representative of the House, executes the orders of the House for the commitment of offenders. He can himself inflict reprimand and censure, in vindication of the privileges of the House. This power of his extends both as against members and as against strangers.

4. The story of the successful assertion of their privileges by the Commons and how the privileges have come to be regarded as part of the *lex et consuetudo parliamenti* of England forms one of the most absorbing chapters in the history of England's fight for freedom and cannot be narrated here. So far as India is concerned, the Legislatures in this country are creatures of statute and apart from the statute creating them, they have no more privilege

to punish for contempt, than a debating society. Section 71 of the Government of India Act, 1935, recognises the right to freedom of speech of members in the Chambers of a Provincial Legislature and in committees thereof and in other respects leaves the privileges of members to be defined by Act of the Legislature itself. But Sub-section 3 of that section expressly provides:

"Nothing in any existing Indian law, and notwithstanding anything in the foregoing provisions of this Section, nothing in this Act shall be construed as conferring or empowering any legislature to confer on a Chamber thereof or on both Chambers sitting together or any committee or officer of the Legislature, the status of a court or any punitive or disciplinary powers other than the power to remove or exclude persons infringing the rules or standing orders or otherwise behaving in a disorderly manner."

In *Doyle* v. *Falconer*[1], it was argued that the power to commit members for contempt was indispensable to the existence of a Legislature and that the very constitution of a Legislature with a right to function as such, *involved* the grant of the means necessary for its exercise. But the Privy Council stated :

"It is necessary to distinguish between a power to punish for a contempt and a power to remove any obstruction offered to the deliberations of a Legislative body which last power is necessary for its self-preservation .... The right to remove, for self-security, is one thing ; the right to inflict punishment is another. The former is all that is warranted by the legal maxim which has been cited, but the latter is not its legitimate consequence."

In this country, the Legislatures have therefore only the powers which are necessary for self-preservation, that is to say, power to remove obstruction : they have no power to inflict punishment for contempt.

5. For the purpose of enforcing the Rules and preventing disorder, the Speaker has, under the Rules,

1. (1866) 4 Moore's P.C. (N.S.) 203.

power *inter alia* to direct any member whose conduct is in his opinion grossly disorderly, to withdraw from the House. If any member is ordered to withdraw a second time in the same session, the Speaker may direct him to absent himself from the meetings of the House for any period not longer than the remainder of the session. In the case of gross disorder, he may suspend the sitting for a time to be named by him. Over persons guilty of contempt against his authority or the privileges of the House, he has no punitive or disciplinary power. If the offender is a member of the Legislative Assembly, he may ask him to apologise, and if he fails to do so, he may under his powers of maintaining order, direct the member to withdraw or absent himself from the Assembly for disobedience of his orders, which amounts to disorderly conduct. If he is a stranger, he can censure him from the Chair and his expressions are protected. He can also refuse a ticket of admission to him to the visitors' gallery if he applies for one ! Similarly if the offender is connected with the Press, he can animadvert on his action and instruct the Assembly Office not to show him any of the concessions or supply him with any information, shown or supplied to the Press ; and he can also refuse a ticket of admission to the Press Gallery if he applies for one. These are all the powers possessed by the Speaker to punish breaches of privilege in the Legislative Assembly.

6. The question of protecting the Speaker from contempt committed by members or non-members is one of very great importance in a parliamentary system of Government. In the absence of such protection, self-respecting men may not be forthcoming to undertake the onerous responsibiltiy of occupying the Chair. In this connection, it is worth while recording what Speaker Peel is reported to have stated with reference to an attack made on him by an Irish member called Conybeare in the 'Daily Chronicle' of the 3rd July, 1893, criticising his refusal to accept a closure motion on the Irish Home Rule Bill. Conybeare had contended that " the Speaker was a public authority and public servant and it was

outrageous that any public servant should be superior to the criticisms of the public Press." Speaker Peel replied : "All I can say, if the doctrine is accepted by this House, is : I would not consent to occupy this Chair for 24 hours."

7. Connected with the question of privilege is the power of the House to regulate its own proceedings within its own walls without interference by any court of law. The rulings of the Speaker are final. He is not bound to give reasons for his decisions and no discussion is allowed on them. There may be shouts of protest against an occasional decision but in theory even such shouts are irregular and disorderly. His conduct can be questioned only by a resolution for his removal under Section 72 (c) (4) of the Government of India Act. Under the old Government of India Act, it was doubtful whether the courts had power to interfere with the procedure of a Legislative Assembly or to question the correctness of a Speaker's ruling, and courts often claimed to exercise jurisdiction over the procedure of the House. In this connection, see *Sen Gupta* v. *Cotton*[1], *Kumar Shankar Roy* v. *Cotton*[2]. But under sections 41 and 77 of the Government of India Act, 1935, the validity of any proceedings in a Legislature shall not be called in question in any court of law on the ground of any alleged irregularity of procedure and no officer shall be subject to the jurisdiction of any court in respect of the exercise by him of his powers.

8. The Speaker of the House is therefore practically an autocrat. He has got immense powers which unless rightly exercised, may bring the parliamentary machine to a standstill. It would be impossible to enumerate all his powers but the more important of them may be mentioned.

9. So far as the Provincial Assembly is concerned, the Speaker has got the unrestricted power of adjourning it and can therefore completely regulate its sittings. The

1. I.L.R. 51 Cal. 874. 2. 40 C.L.J. 515.

power to adjourn implies the power to determine not only the number of sittings but also the duration of each sitting. Under S. 62, of the Government of India Act, the Governor may in his discretion from time to time summon the Chamber or Chambers of the Legislature, prorogue the Chamber or Chambers or dissolve the Assembly. But the power of summoning has been treated as only a power to fix the commencement of a session. So long as the session is unprorogued, there is nothing in the rules preventing the Speaker from holding a sitting of the Assembly day after day and adjourning after a few minutes' business each day; nor is there anything preventing him from adjourning the Assembly even when some important official or non-official business is pending and is awaiting disposal. No doubt, according to the rules as they stand, the Assembly shall ordinarily sit at 11 A.M. and rise at 5 P.M.; but it is well-known that the Speaker of the Madras Legislative Assembly has in practice been allowing the House to sit at 3 P.M. and rise at any time according to the exigencies of business. In theory, there is nothing to prevent him from holding a sitting for days together just as the House of Commons sat on the occasion of the Irish Home Rule Bill for 41½ hours from 4 P.M. on Monday the 31st January 1881 to 9-30 A.M. on Wednesday the 2nd February, 1881, when the sitting was terminated by the famous *coup de etat* of Speaker Brand. The importance of the presiding officer's power of adjournment was illustrated on a momentous occasion in the Central Legislative Assembly. On the 8th March, 1926 when the Hon'ble the Finance Member of the Government of India had made a Demand for Customs, the late Pandit Motilal Nehru made a statement and then he and the members of the Swaraj Party walked out of the Assembly. The President, Mr. V.J. Patel, thereupon made the following announcement:

"The Chair regrets the circumstances which have necessitated the withdrawal from this Chamber of the largest party in this House. The House ceases to be

representative in the sense in which it was intended to be by the Government of India Act, and it is for the Government to consider how far they should continue this House or not. But so long as it is allowed to function, I would advise the Government to bring forward only such business as is absolutely necessary for the purpose of carrying on the administration and not to bring forward any controversial measures. The Chair has a duty to see that the machinery of the Government of India is not abused to the prejudice of the people of this country, and for that purpose, the Chair possesses sufficient powers in the shape of the adjournment of the House *sine die* or in the shape of refusing to put any motion to the House."

The above passage is sufficient to explain what enormous power is implied in the Speaker's right to adjourn the House within a session.

10. While the Speaker thus controls the sittings of the Assembly, his control over the business of the House is also no less striking. He is the sole and unquestioned judge of the admissibility of questions, motions and resolutions. Under one of the rules, he has got the power to permit business to be transacted even though it is not included in the list of business. In cases where the Rules require previous notice of motions, he is sometimes given power to accept motions without notice or accept them on shorter notice. For making certain kinds of motion, his formal consent is necessary, *e.g.*, the making of an urgent motion for the adjournment of the business of the House; and such consent is independent of his ruling as to whether the motion is in order or not and can be refused even if the motion is in order.

11. In addition to his power to control the business that can come up before the House, he has power to direct the course of debate. It is he that calls upon members to speak and fixes the order of the speakers. Whatever the law or the rules in practice, he may allow a member to speak in any language in which a member is anxious to address the House or in which he thinks a member is

proficient. He may permit a second speech by way of personal explanation or otherwise, though the member may have no right of reply. He has power to check irrelevant or tedious repetition and may direct a member who persists in such conduct to discontinue his speech. He has power to call a member to order if the latter infringes certain well-understood rules of debate. In respect of certain classes of business, he has discretion to fix a time-limit upon the speeches.

12. He is the sole interpreter of the rules and the final arbiter of the questions of order that arise in the House. In matters not provided for in the Act or the Rules, he has inherent power to regulate the conduct of business in the manner he thinks fit.

13. The decision of a Chamber on any matter requiring such decision is obtained on a question put to it by the Speaker. If the Speaker refuses to put a question, it will be impossible for the House to give a decision. It will be remembered that in the extract from the announcement of Mr. V. J. Patel quoted in paragraph 9, this power to refuse to put a question was specially referred to, along with the power to adjourn the House, as sufficient to enable him to prevent the use of the machinery of Legislature to the prejudice of the people of this country. He can put a question in any form which in his opinion is best calculated to elicit the opinion of the Chamber correctly. Where amendments have been moved and where there are rival motions before the House, it is also in his discretion to put to the vote any of the motions or any of the amendments in the order in which he chooses to put them.

14. His power to accept a closure is a very important power. Before accepting a closure, he has to satisfy himself that the motion for closure is not an abuse of the rules of the House or an infringement of the rights of reasonable debate and by the way in which he uses his discretion in accepting or rejecting a motion for closure,

he can seal the fate of important measures before the Assembly.

15. He can, if he pleases, *indirectly* influence the decisions of the House. A word or hint from him either from the Chair or in private, may have important effect on the attitude of the Government or on the opinions of parties or members.

16. He can also occasionally. *directly* influence the decision itself, for in the case of an equality of votes, he has the right to give a casting vote. Further, his announcement of the result of a division cannot be challenged.

17. He is also invested with what may be called legislative powers for certain purposes. For instance, he has the power to determine the manner in which questions shall be put and answered. He can determine the method by which votes can be taken on a division. He can make regulations for the conduct of elections to the Public Accounts Committee and the House Committee. He has got power also to make rules regarding admission to the Assembly Chamber of strangers and officials during the sittings of the Chamber.

18. The possession of such extraordinary and varied powers as stated above invests the Chair with an authority and dignity which may truly be characterised as dictatorial. Tradition and etiquette have combined with the rules in further exalting his position. The whole House rises when he arrives in the House. A member when passing to and from his place has to bow to the Chair. No man can pass between the Chair and a member speaking. When the Speaker rises any member in possession of the House ought to sit down. When he is addressing the House, no member should leave his seat, and while he is passing from his room to the House or *vice versa*, a respectful crowd hurriedly makes way and does obeisance to him.

19. It will be noticed that in almost all the functions exercised by him, the predominantly judicial character of his duties is in evidence. His decisions like those of a judge are called "rulings." He is expected to be an

impartial administrator of the rules of procedure, to keep the balance even between the contending parties in the House and in particular to protect the interests of the minorities in the House. The object of Parliamentary Government is to discover the real will of the people through its chosen representatives, and this is done after giving the representatives of minorities full opportunity to discuss, criticise or convince. While it is the duty of the Speaker to see that the power of a majority is not used to ride rough-shod over a minority, he is bound to prevent a minority from using its freedom of debate and other privileges for the purpose of defeating the will of the Legislature. Theoretically he no doubt possesses arbitrary powers. But he is expected so to use them as to further and uphold the will of the House, to help and implement co-operative understandings between the leaders of parties for common work in the interests of the state, and to regard himself rather as a friend and servant of the House than its opponent or master. The famous words of Speaker Lenthall addressed to Charles I on the memorable occasion of the raid by that King on the House of Commons to arrest Pym, Hampden and others, " I have neither eyes to see nor tongue to speak but as the House is pleased to direct whose servant I am " represent to no little extent his exact position *vis a vis* the House and its members.

20. In giving rulings, he daily exposes himself to the risk of unpopularity. His disallowance of questions, resolutions or amendments is oftentimes unpalatable to the members giving notice of them, but it is the least troublesome of his powers to exercise. The calling of a member to speak is often one of the most delicate tasks of the Speaker. It is not an arbitrary power ; the Speaker is expected to call that member to speak who first ' catches his eye,' but this catching of the eye is not a mere physical but an intellectual process. In allowing a member to catch his eye, the Speaker has to remember that his eye is the eye of the House and he must choose that member to speak to whom the House is most anxious

to give its ear. The principle generally followed is that the two sides should be heard alternately, an opponent following an advocate. When members come up with set speeches to deliver and the Speaker for want of time or other reasons is unable to call them, they go away with dissatisfaction. The repression or prevention of irrelevancy or repetition is another cause of grievance. Viscount Ulswater once described irrelevancy as " the chief temptation of parliamentary oratory and the repression of repetition as beyond human capacity." A Speaker incurs no little unpopularity even by enforcing with discrimination the rules against repetition. The granting or withholding of consent to adjournment motions and the acceptance or disallowance of closure motions always give rise to considerable misunderstanding and unpopularity. Even such a trivial act as the allocation of seats in the limited Press Gallery to the representatives of the Press is liable to be criticised.

21. These many and onerous duties however, the Speaker is able to discharge because the House has absolute confidence in him. This confidence in turn is founded upon a knowledge of his absolute integrity and impartiality. The impartiality of the Chair is thus the bed-rock on which his authority is broad-based.

22. Proof of impartiality is expected of the Speaker in two directions—(*i*) that he should not be dependent upon the Government or any other party for favours ; (*ii*) that he should cease to belong to any political party. In respect of the former, the Speaker's independence is secured in England by a reasonable salary when in office, and a peerage and a decent life pension on retirement. As regards the non-partisan character of the Speaker, in England for nearly 125 years he has been regarded as a wholly disinterested and impartial moderator, unidentified with any party organisation or movement inside or outside the body over which he presides. It is stated that after his election, a Speaker does not as much as enter the portals of any political club of which he may happen to

be a member. In fact, the isolation of the Speaker from politics is the condition of his authority over the House and consequently of his usefulness to the House. It is only to the extent to which all parties and members in the House have confidence in the Speaker that they will bestow willing obedience to his orders and make it possible for him to carry them out. In the absence of a general willingness on the part of the members of a legislature to allow the Speaker to function, it would be impossible for the legislature itself to work.

23. The obligation of impartiality is in a sense statutorily recognised in the Government of India Act, where in S. 66 it is enacted that the Speaker shall not vote in the first instance, but shall have and exericse, a casting vote in the case of an equality of votes. And in the exercise of his casting vote, every Speaker feels that he is bound by the parliamentary tradition that he should vote in such a manner as not to make the decision of the House final and should also assign his reasons for voting in the manner he does.

24. The impartiality of the Chair in England has given rise to two important conventions, *viz.*, that so long as the Speaker is willing and able to serve as Speaker, he should be continued in office and that at the election to his constituency he should be allowed an easy walk over, and that his seat should not be contested. In this country, though these conventions cannot be said to have become fully established, it is clear that all parties hold them to be ideals worth striving for.

25. Such are the powers, duties and dignity of a Speaker of a Legislative Chamber. To exercise such powers and duties and to fill such an exalted office with success, not only ability of a high order is required but an urbanity of manner and a dignity of bearing such as would command respect from and at the same time keep in good humour an irritable or excited Assembly. To quickness of decision, he has to combine a clearness of

expression and a firmness of mind which will leave no doubt as to his decision or his unflinching determination to uphold it. More than all, he has always to be on the alert lest the decencies of debate and the personal courtesies between members should at any moment be departed from. On the way in which he is able to perform his duties and to maintain the cherished and inestimable traditions which have become associated with his high office, the successful working of parliamentary institutions depends.

THE MADRAS AGRICULTURISTS' RELIEF ACT, 1938

BY

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The above enactment has dominated the attention of the legal world in Madras in a manner in which no administrative or legislative measure has done in recent times. This is partly due to the very extensive sphere of its operation and influence on the daily life and dealings of the people and partly due to the novel and drastic character of its principles. The agriculturist debtor forms a large class among our people. Perhaps there are not many agriculturists who are not also debtors. They as well as their creditors comprise a very substantial percentage of the population and an Act which affects their relations and dealings must necessarily attract a great deal of attention. This has been emphasised by the large volume of litigation which has followed on the Act. Indeed this type of litigation has bulked largely in the business of our courts and for the time being thrown into the shade all other types of litigation. By itself this is enough to give the Act more than ordinary importance. But its principles have by their novelty and drastic character gripped popular attention. While they have been naturally welcomed by the debtor class they have intensely displeased creditors and also some vocal sections of our people whose notions of fair dealing and legislative propriety this legislation has rudely disturbed. From the time that the Bill was published up to the passage of the Act and even afterwards there was a continuous storm of

criticism, often angry and bitter. The critics have condemned not merely the mode adopted for relief of debt as unfair and improper but predicted grave disorder in the economic system of the country besides excessive litigation and ruin of many creditors and their families. The promoters of the Act, on the contrary, claimed that it would relieve the burden of debt on the agriculturist, "the producer of the people's food" and enable him to pursue his occupation with greater profit to himself and ultimately to the people at large. In view of these peculiar features of the Act it may not be inappropriate to make a brief survey of its principles and of the decisions interpreting them as well as the results of its operation.

2. Before passing it is necessary to mention that a point of attack on the Act was that it was *ultra vires* the local legislature as it trenched on certain subjects in the Federal Legislative List (List I) in the 7th schedule to the Government of India Act, 1935, *viz.*, "cheques, bills of exchange and promissory notes," "corporations including banking corporations". This objection was raised in the debates during the passage of the Bill and in Courts soon after the Act was passed. As many or most of the debts sought to be reduced by applying the Act were due under promissory notes it was contended in suits on the notes and in other proceedings in subordinate courts that the Act was an encroachment on the federal sphere of Negotiable Instruments and was invalid. These courts expressed divergent opinions until a Full Bench of the Madras High Court held that the Act was *intra vires* the Madras Legislature as it related to the provincial subjects of money-lending and agriculture and "the fact that it operated to reduce liability on contracts evidenced by promissory notes could not affect its validity." The question was taken up to the Federal Court, Delhi, in a later case where the provisions of the Act as regards scaling down a decree passed on a promissory note were challenged as invalid. The Federal Court has now held in favour of the validity of the Act in respect of such provisions. From newspaper reports it appears that a

majority of that Court has held that as the liability on the promissory note had been superseded by that under the decree, the Act in so far as it reduces the decretal liability did not involve any question of encroachment on a federal field or repugnancy to the Negotiable Instruments Act. The judgments of the majority do not appear to express any final opinion on the validity of the Act in so far as it affects the rights of a payee or indorsee of a promissory note to recover the amount due under the note from an agriculturist-debtor. The decision has, however, set at rest doubts regarding the validity of the Act in respect of the very large number of applications for scaling down decrees on promissory notes that have been and are being disposed of.

3. The Act is intended for the relief of indebted agriculturists in the Province of Madras. According to the Statement of Objects and Reasons, "the object of the Bill is to rehabilitate agriculture which is the basic industry in this province...... The present deplorable plight of the agriculturist is well-known. While, on the one hand, his income has diminished, on the other, the interest upon his debt has been steadily accumulating, often at an unconscionable rate.... It is the duty of any modern government to relieve the producers of the people's food from this intolerable burden of debt.... Conciliation and other voluntary methods have failed and the adoption of the principle of compulsion has become necessary." The Congress Ministry which took up office in July, 1937, had made apparently election pledges to relieve this distress and therefore proposed shortly after their assumption of office to give temporary relief by means of legislation staying the filing of suits and proceedings against indebted agriculturists. A Bill to that effect, then called the "Moratorium Bill" was published for public information. It proposed to prevent the institution of new suits and proceedings and to stay pending ones in courts for a year, or for one more year if need arose, pending the formulation of comprehensive measures for dealing with the problem of indebtedness. "The intention is to give relief to

agriculturists who have a saleable right in agricultural land situated in the Province and who derived not less than three-fourths of their annual income from such land. Relief will be confined to agriculturists whose liabilities under the heads of land revenue, rents and taxes and cesses payable to local authorities do not exceed four hundred rupees per annum ;" (Statement of Objects and Reasons). This Bill was however dropped partly because of strong opposition to it and partly also because, if one may make a surmise, the comprehensive measures for relief which such a piece of legislation should properly precede were not or could not be decided upon. In October, 1937, the Madras Agriculturists' Relief Bill was published and with certain important modifications made in the Select Committee was considered by both the Houses of the Legislature and passed into law in January, 1938. It was reserved for the consideration of the Governor-General and having received his assent came into force on 22-3-38.

4. The Act enables agriculturists to have their debts 'scaled down,' *i.e.*, either reduced or wholly cancelled as the case may be. Some debts are excepted from this operation. The Act has also a special provision for scaling down arrears of rent due to landholders by their tenants. The main provisions of the Act may be set forth under the following heads :—

(i) *Persons entitled to relief.*—The Act is intended only for the relief of agriculturists. An agriculturist means a person who has a saleable interest in agricultural or horticultural land in the Province of Madras. He may be a ryotwari tenant or an inamdar or a ryot or under-tenure-holder under the Madras Estates Land Act, 1908, or may have an interest in such land recognised by the Malabar Tenancy Act, 1929. He may be also a lessee from any of the above persons. The land should not be situated in a Municipality or Cantonment [S. 3 (ii)]. To this definition of agriculturist there are certain exceptions and the benefits of the Act are not available to the excepted persons. They are: persons who have in either of the two

financial years ending 31st March, 1938, been assessed to income-tax, inland or foreign ; or who have within the two years preceding the 1st October, 1937, been assessed to profession-tax on a half-yearly income of more than Rs. 300, payable to a Municipality or a Cantonment or to a Panchayat which was a Union before 26-8-1930 ; or who have within the two years preceding the 1st October, 1937, been assessed to property or house-tax in respect of property or buildings with an annual rental value of not less than Rs. 600, and payable to a Municipality, Cantonment or Panchayat of the above description ; a landholder of an estate under the Madras Estates Land Act, 1908, or of a share thereof with a peshkash of over Rs. 500 per annum or a quit rent or jodi of over Rs. 100 per annum ; or a janmi under the Malabar Tenancy Act, 1929, paying over Rs. 500 as land revenue to Government [S. 3 (ii) provisos]. In cases of debts incurred after the Act the two financial years ending 31st March, 1938 or 1st October, 1937, as the case may be should be read as two years before the date on which the debt is incurred (S. 13). The effect of this definition is that persons paying income-tax or paying profession-tax or property-tax beyond certain limits, landholders, inamdars and janmis above a certain revenue-paying limit are excluded from the benefits of the Act in respect of their debts. An undivided Hindu family can be an 'agriculturist' but if the family is assessed to income-tax or the other taxes mentioned above no member of it can be an agriculturist. A particular member of such a family may by reason of such assessment be a non-agriculturist and in that case his sons and other descendants in the male line will also be non-agriculturists. In a case where such a family consists of some members who are agriculturists and some who are not, a creditor of the family can proceed against the agriculturist member only to the extent of his proportionate share of the debt which is scaled down under the Act and against the non-agriculturist member only to the extent of his proportionate share of the debt without its being scaled down [S. 3 (i) and Ss. 5, 6 and 14].

This provision is apparently intended to prevent the creditor from recovering the whole debt from the non-agriculturist member. A debtor who has been adjudicated an insolvent is not entitled to the benefits of this Act if prior to the coming into force of the Act a dividend has been declared out of his assets (S. 21). Provision is made to enable a creditor to apply to the Collector or to the executive authority of a Municipality or the President of a Local Board for information as to whether a debtor is assessed to income-tax, profession, property or house-tax as aforesaid. The certificate granted by the authorities shall be received by a Court as evidence of the facts stated therein (Ss. 26 and 27). Religious or charitable institutions, corporations, companies and unincorporated associations cannot be agriculturists entitled to the benefits of the Act [S. 3 (i)].

(ii) *Debts relieved against.*—The provisions of the Act apply to any debt or liability, secured or unsecured, decree or simple, subject to certain exceptions [S. 3 (iii)]. The exceptions are : debts due by way of revenue, tax or cess or loan and payable to the Provincial or Central Government or a Local authority ; any debt secured only on house property in a Municipality or Cantonment or Panchayat of the aforesaid description ; debts due to a Co-operative Society, a Land-mortgage Bank or to a Corporation formed by a special Act of Parliament or a special Indian law ; liability arising out of a breach of trust ; debts due by way of maintenance ; any debt below Rs. 3000 due to a woman who did not own any other property ; wages due to agricultural or other rural labourers ; a usufructuary mortgage by which the mortgagee is in possession and no interest is stipulated ; liability by way of vendor's lien for unpaid purchase-money ; debts due to any public company or to a Scheduled bank as defined by the Reserve Bank of India Act, 1934, if the interest charged does not exceed 9 per cent. per annum (Ss. 4 and 10). The definition of debt in this Act excludes also rent payable by a tenant to a landholder in an estate as defined by the Estates Land Act, and michavaram and 'Kanartham'

as defined by the Malabar Tenancy Act, because special provisions are made in respect of arrears of such dues [S. 3 (iii)].

(iii) *Nature of relief.*—The Act makes a distinction between debts incurred before and those incurred after 1st October, 1932. This was an important change made by the Select Committee. The original Bill made no such distinction and proposed to grant in respect of all debts the relief now granted by the Act for debts incurred before 1st October, 1932. In respect of such debts, S. 8 of the Act provides first, that all interest outstanding on 1st October, 1932, shall be cancelled and only the principal will be payable ; and second, that if more than twice the principal had been paid by way of interest or principal the remaining debt is cancelled and nothing will have to be paid. The debtor can have the benefit of either part of S. 8 and is liable to pay either the balance of principal or the sum which would after past payments make up twice the principal, whichever is smaller. S. 9 of the Act deals with debts incurred after 1st October, 1932. It does not cancel the outstanding interest as S. 8 does but reduces it by providing that interest should be computed at the rate specified by the contract or decree or otherwise but not exceeding 5 per cent. per annum from the date of the original liability up to the commencement of the Act (*i.e.*, 22-3-1938) and after deducting the payments made for interest from the sum so computed, the balance alone will be payable. For the purpose of finding out the principal payable under S. 8 or the date of the original debt, it is provided that when there are subsequent renewals in favour of the same creditor the original loan or advance should be ascertained. The debts payable under S. 8 or S. 9 will be in addition to any sums awarded as costs under a decree or spent by a mortgagee or other persons for preserving the property mortgaged (S. 11). The sums ascertained by applying the above provisions carry interest at 6¼ per cent. from the date up to which they have been scaled down (S. 12). As regards debts incurred after the Act, S. 13 provides that in proceedings

to recover them interest not exceeding 6¼ per cent. simple interest shall be awarded. The Provincial Government is given power to alter and fix this rate by notification.

(iv) *Procedure.*—S. 19 provides that in respect of a decree passed before the commencement of the Act, the court which passed it shall on application made to that court apply the provisions of the Act and either reduce the amount of the decree or wholly cancel it, as the case may be. In doing so, the court should apply payments made or amounts recovered before or after the commencement of the Act first to discharge the costs as originally decreed to the creditor. The application to the court may be by the agriculturist judgment-debtor, or in the case of a Hindu joint family debt by any member of the family, or by the decree-holder. By S. 20 the executing court is bound to order a stay of execution of the decree until the court which passed the decree acts under S. 19. If an application is not made under S. 19 within 60 days of the order for stay, the decree will have to be executed as it stands. Ss. 22 and 23 give relief in cases where the property of an agriculturist has been sold in execution on or after 1st October, 1937 and before the Act came into force. This provision was necessary as execution may have been hurried through in many cases with knowledge of impending legislation.

(v) *Arrears of rent due to landholders.*—All arrears of rent due to a landholder or an under-tenure-holder under the Madras Estates Land Act, 1908 or to a janmi or intermediary under the Malabar Tenancy Act, 1929, which have accrued for the fasli year 1345 (July 1935 to June 1936) and prior faslis and are outstanding on the date of the commencement of the Act shall be deemed to be discharged, whether the arrears are due as such or under a decree [S. 15]. This benefit is available to a tenant only if he pays up the rent due for his holding for fasli 1347 before 30th September, 1938. If the tenant does not fully pay up the rent due for fasli 1346 and 1347 before 30th September, 1939, the arrears of rent due for the prior faslis

will be deemed to be discharged only in the same proportion as his payments for the two faslis bear to the rent due for the two faslis. The tenant can pay the rent due for faslis 1347 and 1346 before the appropriate officer under the Madras Estates Land Act or the Malabar Tenancy Act who will apply the above provisions and determine the extent to which the liability for arrears has been cancelled and the extent of the remaining liability if any.

5. It is no matter for surprise that the above provisions should give room for disputed construction and interpretation. In view of the very large sphere of the operation of the Act and the extent of interests affected by it keen contest over every provision was inevitable especially in the early stages of the application of the Act and before authoritative rulings could be obtained. During the last one year and especially since July last a Division Bench of the High Court has been hearing most of the cases under the Act and given a large number of rulings which have furnished valuable and much-needed guidance to subordinate Courts as well as lawyers and litigants at a time of plentiful litigation under the Act.

6. The effect of the rulings under the Act may be summed up as follows under the headings adopted above for its provisions:—

(i) *Persons entitled to relief.*—The definition of an agriculturist as a person having a saleable interest in agricultural land has received the following illustrations: a holder of a widow's interest; a holder of a vendor's lien; a simple mortgagee; a puisne mortgagee; a purchaser of the equity of redemption; a donee of the whole or part of the hypotheca. In some of these cases, *e.g.*, the case of the simple mortgagee, the phrase 'saleable interest' has by its width of language led to results[1] which the objects of the Act stated in para. 3 above would not warrant. A person who applies to scale down a decree

1. A similar result follows from the ruling that a non-agriculturist purchaser of a hypotheca would get the benefit of the reduction of the mortgage debt due by an agriculturist mortgagor.

passed before the Act should satisfy the definition of agriculturist in the Act on the 1st October, 1937, 22nd March, 1938 and on the date of the application. In the case of a debt incurred but not sued on before 1st October, 1937, the effect of Ss. 7 to 9 appears to be to reduce the liability on 22nd March, 1938, if the debtor was an agriculturist on those two dates though not afterwards. If it is a debt incurred after the Act, the person claiming a reduction of interest under S. 13 should apparently be an agriculturist only at the time he incurred the debt. In the case of a joint Hindu family a member of it will not be an agriculturist if the manager is assessed as such and not individually to the taxes mentioned above. The assessment to tax is the test of holding that a person is not an agriculturist. If assessment of property-tax is in the name of a wrong person, say a deceased ancestor, the actual owner may be able to claim to be an agriculturist. But in spite of an assessment of property-tax in a person's name, it may be open to him to show that he is not the owner of that property. There does not seem to be any inconsistency in these views because the proviso to S. 3 appears to require two conditions, actual assessment to property-tax and ownership of the property. An agriculturist can get relief by scaling down of a mortgage debt though parts of the hypotheca are non-agricultural items, *e.g.*, a house in a municipal area.

(ii) *Debts relieved against.*—The word debt refers to any debt or liability, secured or unsecured, arising under contract or by law. It includes a decree debt. It need not be a personal liability but may be charged on property as that of a purchaser of a hypotheca or the heirs of a deceased debtor liable to pay from his assets. A number of exceptions are mentioned in the Act, and some of them have been judicially considered. For instance a debt due to the Imperial Bank of India is one of them as the Bank is formed by a special Indian Act. Rent due to a Local Board in respect of lands managed by the Board on behalf of a choultry is also excepted. A debt due by

one co-owner to another may be excepted if it arises out of a breach of trust. On a similar principle a liability for restitution should also have been excepted by the Act but as it has not been done, such a liability has been held to be subject to the scaling down provisions. The exception regarding a vendor's lien for unpaid purchase-money would cover a case where in addition to the statutory charge the vendor has taken a promissory note and the assignee sues or has got a decree on it. This exception would include also cases where the vendor takes a mortgage covering other properties besides the property sold. A debt secured by a house in a municipal area and also by a separate parcel of land earmarked for building purposes but not built upon or appurtenant to a building is not within the exceptions.

(iii) *Nature of relief.*—Ss. 8 and 9 are the ruling sections on this subject. On one or two parts of these sections some controversy has arisen. For instance there was some doubt at one time whether the principal amount of a debt which has been the subject of a compromise decree could be traced back from the decree or whether the amount of the decree should be treated as principal. The former has been finally held to be the correct view. There is no distinction in this respect between compromise and other decrees. Another part of the above sections over which decisions have gathered is the clause about " renewal of a debt in favour of the same creditor." This phrase implies necessarily that the debtor and creditor are the same in the case of the original as well as the renewed document. Therefore if *A* takes over the older liability of *B*, *A* cannot claim to treat his document as a renewal. Nor is there a renewal if a debt is satisfied by payment by a third party to whom the debtor executes a new document. It is however open to the debtor to prove that a renewal was really in favour of an agent or benamidar of the creditor in the earlier document. If a debt due to a family is evidenced by documents taken at different times in the names of different members, the renewals would be regarded as in favour of the same creditor. It has been held in one

case that if promissory notes are taken in the name of different members the same rule would not apply and that the creditors would be different by reason of Ss. 8 and 78 of the Negotiable Instruments Act. In that case there was a mortgage in 1926 in favour of the father and a promissory note in April, 1932, in favour of the son for the interest due on the mortgage. It was held that the amount of the promissory note could not be scaled down as interest due on the earlier document. One may be permitted to say with respect that the fact that the holder of a promissory note is the only person who can sue on it does not necessarily conclude the matter arising under the Explanations to Ss. 8 and 9. Under these Explanations the identity of the prior and later debts and the person who originally advanced the money are equally important factors to be considered and it would not do violence to the language to hold in the above case that the family was the real creditor in both documents. But if the real creditor is different then the principle of renewal will not apply. Such a case is where a son executes a mortgage of his own property in discharge of his father's mortgage. A pronote in favour of a lady and renewed in favour of her sons is not renewed in favour of the same creditor. If a note executed before 1932 was indorsed or renewed in favour of a stranger after 1932 the second debt would be scaled down under S. 9 and not S. 8. The principle of renewal will apply to assignments by a creditor because the definition of the word 'creditor' includes his assigns. If in lieu of a pronote executed by *A*, a non-agriculturist, he and his agriculturist brother *B* execute a later note, *B* cannot claim to have his debt scaled down on the basis of *A's* debt. But if *A*, *B* and *C* execute a note and *A*, *X* and *Y* execute a later note in renewal, *A* who is a common debtor under both notes can apply to have his debt scaled down on the basis of the earlier note. The principle underlying cases of renewals is that the original advance should alone be treated as principal and that the interest on it though included in the principal in the renewed documents should, if outstanding, be deemed

to be discharged under S. 8. Besides, if the renewed document is after October 1932, the debtor is entitled to go back to the document or debt before 1932 and have the benefit of S. 8. But if the later document is not a renewal S. 9 would apply. For this purpose more than one renewal may be taken into account and the debt in the earliest document ascertained. There is one important matter on which case-law has gathered, not because of anything that the Act has said but because of its omission to give guidance. That is the question of appropriation of payments. S. 8 enacts that all interest outstanding on 1-10-1937 shall be deemed to have been discharged but it is not always easy to say whether if payments had been made in the past the interest should be treated as outstanding or paid up by means of those payments. As the Act is silent on this matter courts have arrived at certain rules by adapting the principles of the general law of appropriation to the cases arising under the Act. There must be an actual appropriation by the debtor or creditor and not merely a theoretical appropriation. An open payment towards a debt is not proof of any appropriation by debtor or creditor but any actual appropriation before 1-10-1937 by the creditor in his account books, in his plaint or execution petition would be deemed to be first for interest then due and then for principal. Merely allowing counter-interest on open payments is not appropriation. The appropriation should be before 1-10-1937. If it is made after that date the payments will be reappropriated in accordance with the Act. The onus is on the debtor to show that interest is outstanding and has not been paid or appropriated. Other problems are likely to arise and will have to be solved in the light of the above principles. In the draft Bill S. 8 had a proviso which seemed to suggest that there should be a specific appropriation towards principal or interest before 1-10-1937. This was omitted in the Bill as it emerged from the Select Committee. There is no doubt that a provision of that kind would have benefited debtors to a much larger extent than S. 8 as it now stands. The section is also open to the

criticism that its effect is to place persons who have made payments towards their debts in a much worse position than those who never made any payments at all. The principle of ' damdupat ' or double the principal enacted in S. 8 (2) is some protection for the former class of persons but it may not be always adequate.

(iv) *Procedure.*—The procedure under S. 19 for scaling down decrees applies only to decrees passed before the commencement of the Act, *i. e.*, 22-3-1938. As regards future decrees the debtor should invoke the provisions of the Act before the decree is passed and if he fails to do so he cannot apply for its scaling down. In cases of decrees passed before the above date the application for scaling down under S. 19 should be made to the court which passed the decree, *i.e.*, the trial court, even in cases of decrees passed in appeal. The decree of a foreign court transferred to a British Indian court for execution cannot be scaled down at all. Any scaling down made on the application of a judgment-debtor or a member of a Hindu joint family will enure to the benefit of the other judgment-debtors or members who are agriculturists but not of those who are not agriculturists. If any sums are paid either before or after the above date towards a decree passed before that date, they are to be applied first in payment of costs decreed, not of the execution costs nor of any part of a total sum awarded under a compromise decree without any part being expressly allocated to costs. The payment need not be certified under O. 21, R. 2, Civil Procedure Code, so far as the above application for costs is concerned but uncertified payments will not be regarded for other purposes. After the amount is scaled down as on 1-10-1937 it will carry interest not exceeding 6¼ per cent. An application under S. 20 for stay of execution should be made to the executing court. So far there has been no serious difficulty but here again difficulty has arisen from the omission of the Act to provide for an important matter, *i.e.*, right of appeal from orders under Ss. 19 and 20. The framers of

the Act appear to have been undecided about this matter. If they did not want appeals they could have said, as it is usual to say, " Orders under this section are final." If they wanted appeals, they should have provided for them. It appears likely that they wanted to have expeditious proceedings for the relief of debtors and to avoid delays due to appeals. But they were not sure how proceedings would shape and what sort of problems would face courts. When they found later that questions of nicety and difficulty arose and erroneous orders were sometimes passed they provided for appeals by means of a rule under their rule-making power. But this indecision and after-thought have resulted in a great deal of uncertainty in the courts. After varying views held in the High Court a Full Bench has now held, first, that orders under S. 19 refusing to scale down a decree cannot be treated as orders made under S. 47, Civil Procedure Code and are not appealable, and second, that the rule providing for appeals is beyond the rule-making power conferred by S. 28 on the Provincial Government. During the interval of two and a half years between the Act and the Full Bench decision appeals have been entertained at one time, revisions at another time and appeals have been converted into revisions. If an order amending a decree is made under S. 19 it is said that an appeal would lie from the amended decree. The anomaly of course is that if under S. 19 a decree is wholly cancelled the creditor would have no remedy by way of appeal but if the decree is amended or altered to a smaller amount he would have one. The remedy for this unsatisfactory position is legislation. It has been held that an order under S. 20 refusing to stay execution is also not appealable because though it would seem to fall under S. 47, Civil Procedure Code, it is only ancillary to an order under S. 19 which is not appealable.

(v) *Arrears of rent due to landholders.*—The provisions for discharge of arrears of rent apply only if there is a subsisting relationship of landlord and tenant. Therefore a tenant who had surrendered his holding in 1936 could

not claim the benefit of these provisions for cancelling the earlier arrears due to his landlord. An assignee from a tenant can apply under S. 15 but not a person claiming under an assignment after the Act from a non-agriculturist tenant. S. 15 applies only to arrears of rent due as such and not to a decree obtained on a pronote executed by the tenant for his arrears. The term 'rent' does not include jodi payable by an inamdar to a Zamindar or amounts payable by a minor inamdar to a major inamdar for water charges. It does not include tree-tax.

7. There can be no doubt that the Government which undertook this legislation was in dead earnest about its enforcement and the extension of its benefits to all who needed them. The Government issued Press Communiques from time to time explaining the provisions of the Act and giving them publicity. It published rules regulating the procedure to be followed in applications for scaling down of decrees, debts and arrears of rent. Among them is a rule enabling a debtor or a creditor to apply to the court to get a declaration of the amount due in respect of a debt other than a decree debt. The order of the court on such an application is to be regarded as a decree liable to appeal and second appeal. The validity of this provision may be open to challenge in view of the Full Bench decision above referred to. The Government also set apart in the Budget Estimate for 1938-39 a sum of Rs. 50 lakhs for the disbursement of loans to agriculturist debtors for paying up their debts as scaled down. These loans were available to those who own lands or occupancy rights in lands the value of which, free of encumbrances, does not exceed Rs. 5,000. A loan would ordinarily be granted only for satisfying a decree or order for the repayment of a debt passed by a civil court or Debt Conciliation Board in accordance with the Act. The loans officer is given power to scale down undecreed debts if both parties consent and a loan could be got for the discharge of the scaled down debt. Loans would be granted for the discharge of a scaled down debt which does not exceed

Rs. 1,000 or fall below Rs. 100. The rate of interest on the loan is 6¼ per cent. per annum. The Government issued statements from time to time showing the number of applications filed under the Act and the total debts involved and the amounts scaled down in those applications. During the first six months after the Act came into force there were 54,449 cases received in the courts besides 140 in which the Act was applied *suo motu* by courts. Of the former 36,005 cases were disposed of in that period and the rest were pending. The total amount involved in the applications under Ss. 8, 9, 13, 18 (1), 19 and 21 was Rs. 76,09,788-6-3 of which about 47 per cent. was scaled down and the balance was held payable. The statement showing the working of the Act during the 31 months ending with September, 1940, shows that the number of cases disposed of under the Act was 1,45,896 and the total amount involved in the applications was nearly 5¼ crores of rupees of which roughly 2 crores and 90 lakhs (or more than 50 per cent.) had been scaled down. The relief awarded may be small in comparison with the total indebtedness of the agricultural population which was estimated some years ago to be about 200 crores but it is not insubstantial or negligible. The above figures do not of course include the debts which should have been settled out of court in accordance with the Act.

8. It is probable that a good part of the above relief has reached the small agriculturist who had been bearing a heavy load of debt with high interest charges and other usurious terms but it is also probable that relief has reached others less deserving of help. On this and several other matters bearing on the usefulness and justification of the Act there is more or less total absence of information. For instance there are no data to show whether the results anticipated in the Statement of Objects and Reasons are on their way to achievement. The actual debt of the farmer, the mode in which it was incurred, the economic or uneconomic character of his holding and its capacity to pay the scaled down debt, his

potentialities for incurring further debts are among some of the matters which require careful investigation before any large scale results could be hoped for. The absence of any such investigation or comprehensive plan for the improvement of the position of the agriculturist is perhaps the chief defect in this legislation. On the other hand in several countries in Central and Southern Europe drastic measures by way of reduction of interest or principal, moratorium, conversion of short term into long term loans were adopted to alleviate the indebted condition of the farmer after the depression, but these measures were accompanied by others which secured the repayment of the just dues to the creditors and improved the position of the peasant by getting higher prices for his produce. The Madras Act which demanded a great deal of sacrifice on the part of the creditors would have been less open to criticism if the reasons of public interest requiring that sacrifice could be more clear than they are at present. This criticism applies only to the statutory cancellation in part or in whole of certain past debts, *viz.*, the pre-depression debts. As regards later debts the Act has only the effect of reducing the rate of interest and such types of legislation are not unknown to the Statute Law in India. The Deccan Agriculturists' Relief Act, 1879, is an old and notable instance. The provisions in the Madras Act regarding cancellation of arrears of rent due to landholders are in practice not likely to have caused any great loss to them as they would have got the benefit of payment of rents for the faslis 1347 and 1348 before September, 1939. This benefit would perhaps be sufficient compensation to the landlord for the loss of what in most cases would be no more than his legal right to take coercive processes by distraint and sale of the tenant's property. It is probable that the future holds for us more drastic and socialistic measures than the Madras Act of 1938, but one may be permitted to express the hope that such measures would be designed on a scientific basis for tackling the big and difficult problem of debt.

SOME ASPECTS OF THE LAW OF HOMICIDE

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During the pendency of any murder trial what agitates the mind of the public is whether the accused would be hanged if convicted. In addition, the junior members of the bar may be learnedly discussing whether the offence committed is murder or culpable homicide not amounting to murder. The answer to both these questions that an experienced lawyer would give is —Wait and see. The first question as to whether in a murder case the death sentence will be passed or carried out has been left intentionally vague. First of all, the power that Government has to commute the death sentence cannot by a law be limited to specified circumstance because it exists primarily to undo the possible injustice of the law. While Government must show mercy in every proper case, it must discharge this duty with the utmost care. If death sentences are habitually or in a large number of cases commuted, this in the long run may have the effect of reducing the burden of responsibility which lies so heavily on every judge of the High Court passing or confirming a sentence of death. Judges may be led to take more lightly their duty of seeing whether there are any reasons for passing the lesser sentence if Government by too frequent interference gives the impression of having taken over that duty. Judges may legitimately think of the power vested in Government only if the law does not give judges any discretion. But on a conviction for murder judges have the discretion to pass a sentence of transportation for life.

This choice which the law gives between a sentence of death and of transportation for life, is its second intentional uncertainty. But this discretion to give the lower sentence is judicial discretion[1] and unlike executive discretion has an inevitable tendency gradually to lose elasticity. Precedents have a restraining effect. Also the rule by which every death sentence passed by a Sessions judge has to be confirmed by two judges of the High Court leads to divided responsibility. A Sessions judge sentencing a prisoner to death is no doubt relieved by the thought that before he is hanged two judges of the High Court have to satisfy themselves about the justice of the sentence. On the other hand the two judges before whom it comes for confirmation have all the disadvantages of appellate tribunals ; they do not see the accused nor do they hear the witnesses. In quite a number of cases the High Court reduces the death sentence passed by the Sessions judge to one of transportation for life. In those cases no reflection is cast on the trial judge. The High Court does not disapprove of his severity or call him blood-thirsty. But the position is different if the Sessions judge himself gives the lower sentence or acquits the accused on the charge of murder and convicts him for culpable homicide not amounting to murder. There may then follow sometimes consequences which may be indifferent to him as a judge but which he may like to avoid as a human being. The consequence is a petition by Government for enhancement of the sentence to death or an appeal against acquittal on the murder charge. Sometimes the wretched prisoner brings the trouble on himself by appealing to the High Court against the lower sentence passed by the Sessions judge ; when the case comes to the High Court, judges have been known to give the Public Prosecutor a broad hint that it may be a fit case for enhancement and a petition for the purpose is then filed. (See *Emperor* v. *Kaliappa Goundan*[2].) If a petition for enhancement of sentence or an appeal against acquittal is allowed, theore-

1. *Nathu* v. *Emperor*, 191 I.C. 303 All.

2. 38 L.W. 522.

tically it should be no greater reflection on the trial judge than a successful appeal against conviction or a reduction of sentence on appeal. But actually it does not appear to be so. This belief might ultimately affect a free exercise of judicial discretion in choosing between the two punishments available for murder if ever we get Sessions judges of a calibre inferior to that of the men we have now. They might well say to themselves "why should we invite a snub? ; we shall pass the death sentence and leave it to the High Court to reduce it." There would be no room for this danger if in dealing with petitions for enhancement of sentence certain well-known observations of judges are not forgotten. The proper course to adopt in these cases was stated in *Public Prosecutor* v. *Karri Gaviresu*[1] in the following terms :—

"The High Court will be very reluctant to enhance a sentence passed by the Sessions Judge except upon very strong grounds. The mere fact that the High Court if it acted as a court of first instance would have passed a heavier sentence is by itself no ground for enhancing a sentence in revision. Where, on conviction for murder the Sessions Court awarded a sentence lesser than death, the High Court will not enhance the sentence unless it is satisfied that on the evidence in the case the sentence of death is the only possible sentence which could have been passed by the Sessions Court."

The Lahore High Court expressed itself in almost similar words in *Uttam Singh* v. *The Crown*[2]. It certainly will not improve administration of criminal justice if this salutary principle is disregarded.

In addition to the uncertainty about the sentence which exists for good reasons, a far less satisfactory uncertainty is whether one accused of murder will ultimately be convicted for that offence or the lesser offence of culpable homicide not amounting to murder. There is no difficulty in cases where the accused seeks to escape conviction for the more serious offence by showing that he is entitled to the benefit of one of the exceptions to S. 300 of the Indian Penal Code. If there is no chance of proving one of the

1. 1934 M.W.N. 958. 2. A.I.R. 1938 Lah. 347.

exceptions and the simple question is whether S. 299 or S. 300 will apply to a given case, the lawyer will have to depend for a practical answer not so much on his knowledge of the law as on his experience of the particular judge. In a few cases where the difference between the two sections was the main issue, it has been stated with care and precision by some judges but unfortunately not so by all. The difference in its isolated form does not come before the courts sufficiently often to leave a firm impression on the minds of the bench and the bar. No lawyer depends exclusively on this difference to save his client from the hangman. The vagueness of this difference is one of the major defects of the Indian Penal Code.

This vagueness and the consequent uncertainty unlike the others previously referred to was not intended by the law. The Law Commissioners who drafted the Code were most anxious to be precise. They say in their letter accompanying the first draft :—

> "There are two things which a legislator should always have in view while he is framing laws : the one is, that they should be as far as possible precise; the other that they should be easily understood...... A loosely-worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making law to the Courts of Justice."

Legislation by courts does not seem to have produced any satisfactory results even after eighty years. One wonders why this is so. Is it because the front rank lawyers have not interested themselves in criminal law or because criminal lawyers never get on to the High Court Bench to make that valuable contribution to the advancement of law that civil lawyers have made? The only persons with experience of criminal law on the High Court Bench are District judges promoted to that office. They are excellent men and an asset to the High Court and it is not their fault if they can make no large contribution to the philosophy of the law.

Another tragedy of the Indian Penal Code is that it is sometimes called on to bear the oppressive weight of

English criminal law. Principles and ideas are from time to time borrowed from English criminal law in interpreting the Code : the only result of that is confusion. This happens even though the Privy Council has stated that the Code is complete and exhaustive in itself. Unlike some other Indian enactments, the Penal Code is not based on English law. The Law Commissioners wrote :—

> "Your Lordship in Council will perceive that the system of penal law which we propose is not a digest of any existing system, and that no existing system has furnished us even with a ground work."

After referring to the unsuitability of Mohammedan, Hindu and Anglo-Indian criminal laws prevailing in different parts of the country they come to English criminal law. What they say about it may be painted in large letters on the walls of every Court that has to interpret the Penal Code :—

> "The population which lives within the local jurisdiction of the Courts established by the Royal Charters is subject to the English criminal law, that is to say, to a very artificial and complicated system,—to a foreign system—to a system which was framed without the smallest reference to India,—to a system which in the country for which it was framed is generally considered as requiring extensive reform,—to a system finally which has just been pronounced by a Commission composed of able and learned English lawyers to be so defective that it can be reformed only by being entirely taken to pieces and reconstructed."

English criminal law does not deserve this wholesale condemnation. Macaulay perhaps could not restrain himself when once he started on denunciation. It is a hundred years since this criticism was made and yet Englishmen have kept their old criminal law with but minor alterations. But the Law Commissioners must certainly be turning in their graves every time some section of the Indian Penal Code is interpreted in the light of English criminal law.

Certain rules embodying the distinction between culpable homicide and murder can be stated with reasonable accuracy by any good student. Some of them

would undoubtedly be elementary. But vital errors can be committed by forgetting or not knowing these elementary ideas. As long as ago as 1866 Mr. Justice Campbell said in *Queen* v. *Gora Chand Gopee*[1] :

> "In regard to the difference between culpable homicide and murder there seems to be some repetition and tautology in Ss. 299 and 300[2]. We may put the exceptions out of the question for the present. Supposing the culpable homicide comes under none of these sections, is it then necessarily murder? It appears not."

That there is a distinction between what is defined by S. 299 and by S. 300 apart from the exceptions is now generally admitted. But it is amazing that the contrary view should continue to persist and find expression by judges of our highest Courts. In *Ramlal* v. *King-Emperor*,[3] Mr. Justice Wazir Hasan says :

> "The legislature enacts the four clauses (of S. 300) which are intended to give a complete and exhaustive definition of culpable homicide. It cannot be suggested that an act may amount to an offence of culpable homicide, even if it does not fall within one or the other clauses of S. 300. These clauses must, therefore, be taken to define the limits and to be exhaustive in themselves, for the purpose of this code of the offence of culpable homicide."

According to this judge there can be no culpable homicide which does not satisfy the definition of murder and therefore the two offences are identical but for the exceptions. The latest in the series of what may be described as fundamental errorists is Mr. Justice Mackney of the Rangoon High Court in *The King* v. *Aung Nyun*[4]. But the case was referred to a full bench and the main question was correctly answered even though there are other errors in the judgment of the full bench. There are other decisions where this fundamental error is not openly avowed but the conclusions arrived at look

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1. 5 W.R. (Cr.) 45 : Beng.L.R. (Supp Vol.) 443.

2. The learned judge himself produced this tautological sentence in criticising the tautology in the sections.

3. I.L.R. 3 Luck. 244.

4. 1940 Rang. 441, Since writing the article the writer has read a fuller report of Mr. Justice Mackney's judgment in 191 Indian Cases 306. If the article gives the impression originally formed by the writer that the judge had not adequately considered the case-law on the subject, he wishes now to correct it.

as if they were based on them. It would seem as if the distinction between the two sections is admitted but the difference is not perceived. A few of these cases will be considered at a later stage.

Perhaps one of the reasons for this erroneous view is the belief that in England every homicide is murder unless the accused proves some circumstance of mitigation to reduce it to manslaughter. It has recently been laid down by the House of Lords that that is not the law even in England. In *Woolmington* v. *Director of Public Prosecutions*[1], Lord Sankey said :

> "Throughout the web of English criminal law one golden thread is always to be seen—that it is the duty of the prosecution to prove the prisoner's guilt......When dealing with a murder case the Crown must prove (*a*) death as a result of the voluntary act of the accused and (*b*) malice of the accused. It is *not* the law of England to say, as was said in the summing up of the present case 'If the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident.' If the proposition laid down by Sir Michael Foster and others means this,—this authority is wrong."

No one can appreciate the difference between culpable homicide and murder who does not keep clearly in his mind the meaning of the word 'intention' as used in the code and its purposeful separation from mere knowledge of the likelihood of certain consequences ensuing. Responsibility for injury is determined in civil law by the well-known fore-knowledge test which means responsibility for injury actually foreseen by the wrong-doer or what an average reasonable person in his position would have foreseen. This basis of liability is stated by the maxim—everyone is presumed to intend the natural consequences of his act. The authors of the code however did not fix responsibility for consequences in this form. The fore-knowledge rule is carefully divided and graded into four classes :—(1) Intention (2) Knowledge

1. (1935) A.C. 462.

of the likelihood of the consequence (3) Reason to believe the consequence to be likely (4) Rashness and Negligence when the consequence is not actually foreseen but ought to have been foreseen. The last of these is not ordinarily made a basis of liability under the code except in a few cases where rashness and negligence have led to the death or hurt of a human being or endangered life. The other three states of mind are drawn on for prescribing *mens rea* required for offences under the code. Sometimes any one of the three is considered sufficient to fix responsibility and in these cases the code uses the compendious word " voluntarily." Merely because in certain cases the same responsibility arises in whichever of these three states of mind an act is done, it does not mean that they are identical. If they are identical no significance can be attached to the careful selection of only two or sometimes only one of them for inclusion in the definitions of several offences. For homicide, intention to produce or knowledge of the liklihood of the prohibited consequence alone will suffice : the accused is not liable if he has only reason to believe death to be likely. A person is not guilty of using criminal force unless he has done so intentionally. S. 304 is a typical illustration of the difference between these three states of mind and their gradation. If death is caused with the intention of causing death or bodily injury likely to cause death the punishment can go up to transportation for life under the first part, but if there is only knowledge that death is likely the punishment cannot exceed ten years under the second part. Where there is only reason to believe that death is likely no punishment is provided by S. 304. If death is due to rashness and negligence S. 304-A fixes a maximum punishment of two years.

The distinction between the different states of mind and their gradation is based on the old theory that punishment should fit the crime. But in civil law there is no need for any distinction between these different states of mind . Once the defendant's liability is established by

the fore-knowledge test, the only other question is the extent of damage suffered by the plaintiff. The defendant is not called upon to pay more damages when the injury is intentional than when it is due to negligence. The civil law maxim that a person is presumed to intend the natural consequences of his act does not therefore contemplate any distinction between the different states of mind. The word ' intention ' in that maxim includes not only ' intention ' of the code but also knowledge of the likelihood of a consequence and reason to believe it to be likely as well as rashness and negligence. The ' intention ' of the code is but a small part of the ' intention ' of the maxim. The ' intention ' of the code is to be found as a fact. The intention of the maxim is a fiction of the law.

This narrow meaning of the term intention in the code has been carefully explained in more than one case particularly in connection with the offence of trespass which is not committed unless the offender is shown to have had an intention to intimidate, insult or annoy. The best of them is a full bench case of the Madras High Court *Vullappa* v. *Bhima Rao*[1]. The judgment of Wallis, C.J., is worth careful study. After referring to Sir James Stephen's definition of ' intention ' in English criminal law he proceeds :—

> " On the other hand, it is clear that this was not the view of the meaning of 'intent' taken by Macaulay and the other Indian Law Commissioners in the draft Penal Code. They regarded the maxim that every one must be taken to intend the natural consequences of his acts as a fiction which should not be recognised in the Penal Code."

He then refers to an extract from the report of the Law Commissioners on the question which will be examined later. Then he says :

> "An examination of the Indian Penal Code as finally passed shows that it was framed on these lines. The maxim that every one must be taken to intend the natural consequences of his acts is incorporated in the definition of 'voluntarily' in S. 39, and thus made applicable in every section, where that word is used. More generally doing the act with a criminal knowledge or a criminal intent is

1. I.L.R. 41 Mad. 156.

expressly made punishable. S. 35 speaks of 'an act which is criminal only by reason of its being done with a criminal knowledge or intention' and the distinction is observed in Ss. 87 to 89, 166 and 167, 194, 295, 297, 299, 350, 366, 367, 425, 429, 504 and 505, in all of which doing the act with intent and doing the act with knowledge of the consequences are both made punishable. ....The contrast with the language of S. 441 is very suggestive."

In *Dhirajia* v. *Emperor*[1] which was a case of homicide Braund, J. said :—

"'Intention' appears to us to be one thing and 'knowledge' appears to us to be a different thing."

A more recent judgment on trespass is that of the Patna High Court in *T.H. Bird and others* v. *Emperor*[2]. They say :—

"Where the Indian Penal Code wanted to make criminality depend upon the knowledge of the doer of an act, it has specifically stated so...... Intention is a question of fact and has to be determined in each case.... The Court cannot as a matter of law presume intention from the natural consequences of the act. This is a fiction of the English law and is not the Indian law of trespass. It cannot be said in every case that a man must be taken to have intended what follows as a result of his act."

Vullappa v. *Bhima Rao* and an earlier case of the Madras High Court, *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan*[3] reveal a certain reluctance on the part of some judges to accept this restricted meaning of the word 'intention' and a strange affection for the maxim that a person is presumed to intend the natural consequences of his act. These judges are Benson, J., Oldfield, J., and Ayling, J. It is no doubt an accident that they all belonged to the Indian Civil Service and does not justify the inference that there is a civil service conception of 'intent.' It would have been all to the good if persons interpreting the Indian Penal Code had never heard of the maxim.

The difficulty felt by these judges is not a new one. It occurred to an early critic of the original draft of the code—Mr. Norton. He said :—

"It appears to me impossible to read as far as this chapter without suspecting that the commissioners have some peculiar object

1. 38 All.L.J. 563.
2. 35 Cr.L.J. 421.
3. I.L.R. 35 Mad. 186.

in distinguishing on so many occasions between the doing of an act 'with an intention' to effect a certain result, and doing it with a 'knowledge that it is likely' to produce that result. Now there appears to me to be an error in principle in legislating on any such distinction, and I mention it the more pointedly at this opportunity, because I think the present chapter will afford more than one instance of the uncertainty, and even of the absurdity which may arise from the applications of such a distinguishing doctrine. The principle of English Law is that a man's intentions and designs are to be judged by the quality of the act done, and that he shall be *presumed* to have intended that which his act was naturally likely or calculated to effect. But if the commissioners' distinction above noted is really intended and is to prevail, in estimating the substantial quality of an act, it will follow that a man is to be supposed to be capable of designing a thing by means not at all likely, to effect it, or, on the other hand, he is to be supposed capable of doing a thing which he knows to be likely to cause a certain effect and at the same time not to intend that result."

This criticism is specially valuable as it enabled the law commissioners to explain the scheme of the code. The law commissioners then in charge of the draft code made the following reply to Mr. Norton's objections :—

"The Commissioners (original) saw clearly the difference between 'intent' and 'knowledge of likelihood' and meant to express it distinctly, in order to avoid the necessity of fiction in laying a charge, as for example by imputing 'intent' constructively where the circumstances imply only a 'knowledge of likelihood....' The deduction of Mr. Norton *that 'a man is to be supposed capable of doing a thing which he knows to be likely to cause a certain effect and at the same time not to intend that result' we do not dispute: on the contrary we hold it to be true:* and therefore we think that the distinction in question is reasonable and proper."

We have only to look at a standard text book on jurisprudence like that of Salmond's to satisfy ourselves that the authors of the code have done no violence to any principle of English Law and the word 'intention' is used in the code in a sense approved by jurists. We read in Salmond :—

"Intention is the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire of it.... Intention is the foresight of a desired issue, however improbable—not the foresight of an undesired issue, however probable...... Conversely expectation does not in itself amount to intention......

Consequences may be known to be inevitable but not desired and therefore not intended...... Law may and indeed often does impute to a wrong-doer an intention which in fact he did not possess...... It does not seem possible to lay down any general principle as to the cases in which such a constructive intention beyond the scope of his actual intention is thus imputed by the law to the wrong-doer. This is a matter pertaining to the details of the legal system. It is sometimes said indeed that a person is presumed in law to intend the natural or necessary results of his actions. This however is much too wide a statement, for, if true, it would eliminate from law the distinction between intentional and negligent wrong-doing, merging all negligence in constructive wrongful intent. A statement much nearer the truth is that the criminal law treats as intentional all consequences due to that form of negligence which is distinguished as recklessness—all consequences, that is to say, which the actor foresees as the probable results of his wrongful act. To this extent at least the intention in law is of wider scope than intention in fact. The reason for the recognition by the law of such cases of constructive intention is the expediency of extending to the more serious forms of negligent wrong-doing the liability or additional liability attached to wilful wrong-doing. *Magna culpa dolus est.*"

As has already been seen it is just this fiction of English criminal law that the authors of the code set themselves to avoid. They wanted the charge to be stated and proved in accordance with the facts. What the constructive intention of English criminal law was calculated to serve according to Salmond, was achieved in the code by specifically providing punishment for acts done with knowledge of the prohibited consequences whenever it was considered expedient to do so. Sometimes it is punished as severely as an act done with the intention to produce the consequence, sometimes more leniently and in other cases no punishment is provided. Thus actual intention or intention in fact described by Salmond is the 'intention' of the code and there is no room at all for any constructive intention. What is more, the code grades punishment according to the actual state of mind of the offender, the consequence that has taken place being the same. When a criminal act results in the death of a human being provision is made for four grades of crimes—(1) Murder, (2) Culpable homicide punishable under the 1st part of S. 304, (3) Culpable homicide punishable under

the 2nd part of S. 304, and (4) Homicide by a rash and negligent act. In all these cases death is a natural and probable consequence and if intention to cause death is presumed they would all be murders !

Yet intention continues to be defined as a presumption even in full bench judgments. The form in which Roberts, C.J., of the Rangoon High Court puts it is almost a model of what should not be done. In *The King* v. *Aung Nyun*[1] he says—

> "When questions of intention have to be considered it must be borne in mind that every person is presumed to intend the natural and probable consequences of his acts until the contrary be proved. So it is necessary in order to arrive at a decision as to an offender's intention to inquire what the natural and probable consequences of his acts would be."

And one of his colleagues on the full bench, Mya Bu, J., adds :

> "Thus there is an accepted doctrine that a man of mature understanding is presumed to intend the natural and probable consequences of his acts. This doctrine itself is based on the presumption that a person of mature understanding knows the natural and probable consequences of his acts. Therefore, if a person does an act knowing what its natural and probable consequences will be, then he is presumed to have intended by that act to give rise to such consequences."

To know that in the Code intention is the foresight of a desired issue and that expectation does not in itself amount to intention is to eliminate the possibility of many errors in construing Ss. 299 and 300[2]. With this

1. 1940 Rang. 441 at 454.

2. S. 299.—Whoever causes death by doing an act (*a*) with the intention of causing death, or (*b*) with the intention of causing such bodily injury as is likely to cause death or (*c*) with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

S. 300.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which death is caused is done (1) with the intention of causing death, or (2) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or (3) If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or (4) If the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

as a necessary foundation an examination of the difference between the two sections may now be proceeded with.

The first clause of S. 300 provides that it is murder if the offender had the intention of causing death. What is required is a finding as an actual fact that the accused desired to cause death whether as an end in itself or as a means to something else.

In the second type of murder bodily injury must be intended and the bodily injury intended must be known to the offender to be likely to cause the death of the person to whom the injury is caused. A particular kind of intention together with a particular kind of knowledge constitutes murder under the second clause of S. 300. Without the knowledge it would be culpable homicide not amounting to murder under the second clause of S. 299. In the Rangoon case already referred to. (*The King* v. *Aung Nyun*[1]), Mr. Justice Mackney had considerable difficulty in accepting this difference.

> "There is no justification" he said "for drawing a distinction between an act causing death, which is done with the intention of causing such bodily injury as is likely to cause death, and an act causing death which is done with the intention of causing such bodily injury as is known to be likely to cause death.... Intention to cause bodily injury likely to cause death cannot be assumed unless the offender also knows that the bodily injury which he intended to inflict is likely to cause death."

His difficulty arose because he thought that the second clause of S. 299 required that the accused should cause that kind of bodily injury which he expected would kill his victim. As explained in the learned dissenting judgment of his colleague, Mosley, J.:

> "the expression 'intention to cause such bodily injury as is likely to cause death' merely means an intention to cause a particular injury, which injury is or turns out to be, one likely to cause death. It is not the death itself which is intended, nor the effect of the injury."

Mr. Justice Mosely however gives to clause 2 of S. 300 a restricted meaning which does not seem to be warranted

1. 1940 Rang. 441 at 454.

in a judgment which is otherwise excellent. He says that in S. 300 (2)—

> "Stress is laid on the offender's knowledge of the effect on the (particular) person injured. It may be said of course that in every case of a fight between two men (with the exception of that described in S. 301) the offender's intention is directed against the person injured; but S. 300 (*b*) does not deal with the general case of causing injury known to be likely to cause death...... All provisions of the penal law must be interpreted, if there is room for doubt, in favour of the subject, and most of all the provisions relating to the offence of murder. • In my opinion, this general case is not within the four corners of S. 300 and can only be dealt with under S. 299 unless S. 300 (3) applies, as I believe it does in the vast majority of such cases."

Roberts, C.J., and Mya Bu, J., two of the three judges who delivered separate judgments when the case came before the full bench seem to endorse the views of Mosely, J. This view does not appear to have been expressed in this definite form in any earlier case and is *obiter* even in this. Mosely, J's only reason for excluding what he calls 'the general case' is the obligation of interpreting a criminal statute in favour of the subject: but as he himself says there must be room for reasonable doubt before doing so. This clause obviously provides for liability even when the injury caused is incapable of killing an ordinary person but is likely to cause the death of the individual to whom it is caused because of disease or 'disability' and this likelihood is known to the offender. But there is nothing in these words to exclude 'the general case.' What Mosely, J., means by 'the general case' is knowledge that the injury is likely to cause the death of any human being because he is a living human being and not because of any disease he may be suffering from. Surely an injury which is known to be likely to cause the death of any normal person (general case) would be known to be at least equally likely to cause the death of any particular person to whom it is caused unless he is known to the offender to be immortal or to be immune to that injury which to ordinary men is

fatal.[1] An injury which is likely to kill a person because of his special disease must *ex hypothesi* be less serious or even trivial as compared with an injury which is likely to kill a normal person. To exclude 'the general case' would lead to this illogical position that the less serious injury would be murder but not the more serious one, there being in both cases knowledge of its fatal consequences. Mosely, J., himself says so but he does not notice the illogical result. The illogicality is not removed by the fact that 'the general case' would come under S. 300 (3) in " the vast majority of such cases." It would still be there for the small minority of such cases. An intentional injury which is known to be likely to cause death ('general case') may yet not be sufficient in the ordinary course of nature to cause death so as to come under S. 300 (3). Apart from the offender knowing it to be likely, the injury may not in itself be likely to cause death to justify conviction even under S. 299 (*b*). If S. 300 (2) like some of the other clauses, had read " with the intention of causing such bodily injury as the offender knows to be likely to cause death," there would have been no doubt about 'the general case' coming under it. But there would have been some doubt if injuries which are capable of causing death only in special circumstances would support a conviction. The additional words found in clause 2 are apparently there to remove that doubt and not for excluding 'the general case' and confining it to the special circumstances. S. 300 (2) is merely a combination of the intention in S. 299 (*b*) and the knowledge in S. 299 (*c*). Each by itself is culpable homicide and the two in combination constitute murder under S. 300 (2).

The third clause of murder which requires that the act should be " done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death " and its difference from the second clause

1. For example, *Yogis* who swallow poisons and other dangerous substances without ill-effects or allow themselves to be buried underground and then come out alive after several hours or even days.

of culpable homicide ("with the intention of causing such bodily injury as is likely to cause death") are not only difficult to understand abstractly but lead to considerable arbitrariness in their application to any given case. This is an illustration of a "loosely-worded law" for which however the original law commissioners were not responsible. Legislation by courts on this clause has been good but somewhat ineffective. One cannot help wishing for an opportunity to arise from which all those benefits to be got from a judgment of the Privy Council on the point may be obtained.

In one of the earliest cases in which the difference between Ss. 299 and 300 was considered (*The Queen* v. *Gora Chand Gopee*[1]), Sir Barnes Peacock, C.J., does not appear to have noticed the difference between S. 300 (3) and S. 299 (*b*) even though Campbell, J., one of the judges who made the reference to the full bench dealt with it. But there has been available to the Indian legal world since 1875 a concise and masterly statement of the difference between the two offences generally and in particular between these two clauses, by Melvill, J., in *R.* v. *Govinda*[2]. This has been the undisputed authority on the subject for the last 65 years. Knowing this case is the second important requisite for understanding the law on the subject, second only to appreciating the true meaning of the word 'intention' in the code. But there is reason to suppose that this case lay dormant for a long time. Lawyers must have had too little faith in the distinction between the two offences and relied on it but rarely to prove that their clients, even if guilty, could not be convicted for murder but only for culpable homicide not amounting to murder. Among reported cases it is not till we come to *Gahbar Pande* v. *Emperor*[3] and *Inder Singh* v. *The Crown*[4] that there is any definite revival of the memory of *R.* v. *Govinda*[2].

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1. (1866) 5 W.R. (Cr.) 45: Beng. L.R. (Supp. Vol.) 443.
2. I.L.R. 1 Bom. 342.
3. I.L.R. 7 Pat. 368.
4. I.L.R. 10 Lah. 477.

The facts of *R.* v. *Govinda* were very simple. The accused a young man of 18 gave his girl-wife a few blows on the face when she was down on the ground. One or or two of these blows which were violent and delivered with the closed fist caused an extravasation of blood on the brain and she died soon afterwards. The Sessions judge found him guilty of murder and sentenced him to death. The two judges of the High Court before whom it came for confirmation were not agreed whether it was murder or culpable homicide and it was therefore referred to Melvill, J.. It was in expressing his opinion on these facts that Melvill, J. stated the distinction between the two offences. After dealing with the distinction between the other clauses of Ss. 299 and 300, he proceeds—

"There remains to be considered Ss. 299 (*b*) and 300 (3) and it is on a comparison of these two clauses that the decision of doubtful cases like the present must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine but appreciable...... It is a question of degree of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from a fist or stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death."

Applying the distinction stated by him to the facts of the case he came to the conclusion that the accused was guilty of culpable homicide and not of murder. He said :—

"I do not think there was an intention to cause death; nor do I think that the bodily injury was sufficient in the ordinary course of nature to cause death. But a violent blow on the eye from a man's fist while the person struck is lying with his or her head on the ground, is certainly likely to cause death...... For these reasons I am of opinion that the prisoner should be convicted for culpable homicide not amounting to murder, and I would sentence him to transportation for seven years."

In referring *Gora Chand Gopee's* case to the full bench Campbell, J. stated the difference between culpable homicide (*b*) and murder (3) as follows :—

"If the injuries inflicted are so severe as not only to be likely to cause death, but almost of necessity to cause death" it is murder (3). "The difference is in fact not very broad but it must be supposed that the law intended to make some difference."

Gahbar Pande v. *King-Emperor* is another case where the difference between Ss. 299 and 300 had to be considered. While the case is useful in that it stresses the reality of the difference, it is unfortunately marred by certain misconceptions on the part of both the judges who disagreed as well as the third judge to whom it was referred. The accused as a result of some trivial quarrel hit the deceased, a girl of 15 on the head with a lathi and before or after this gave two more blows on the legs. The blow on the head caused a fracture of the skull and was the cause of the death. The Sessions judge convicted him for murder and sentenced him to transportation for life. Against this the prisoner appealed. Kulwant Sahay, J., was for altering the conviction to one for culpable homicide not amounting to murder while Allanson, J., was for dismissing the appeal. Kulwant Sahay, J., said :

"It is conceded that he had no intention of causing death. It is hard to suppose that he intended to cause the injury which was, as a matter of fact, caused by the blow on the head given by him. I am of opinion that he had not the intention of causing such bodily injury as he knew to be likely to cause death but intended only to chastise her...... The third clause of S. 300 also does not in my opinion apply. Here also it must be shown that the injury which Gahbar intended to cause was such as to be sufficient in the ordinary course of nature to cause death. A blow on the head with a lathi is certainly likely to cause death and the *person who inflicts a lathi blow on the head of another person must be presumed to have the intention of causing such bodily injury as is likely to cause death.* But to my mind it does not necessarily follow that a lathi blow on the head is always sufficient in the ordinary course of nature to cause death, and I have already found that he had no intention of causing the bodily injury which was as a matter of fact caused, namely, the fracture of the skull which resulted in the death of the girl. Now if a person causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, his offence comes under S. 299...... Upon the evidence I am of opinion that the injury inflicted upon the girl was inflicted by the appellant with the knowledge that it was likely

to cause death but without any intention to cause death and the case falls under the second paragraph of S. 304 of the Indian Penal Code. I would therefore...... sentence the appellant to seven years' rigorous imprisonment."

There are many things in this judgment that are open to criticism. The judge is wrong in saying that the appellant must be shown to have had the intention of fracturing the skull before he can come under clause 3, because it is enough if he had desired to cause an injury as serious as the fracture of the skull. Just as in the case of grievous hurt if one kind of grievous hurt is intended but another kind is caused there would still be liability, similarly here also if one sort of bodily injury is desired to be caused and is sufficient to cause death but another sufficient in equal measure to cause death results, the case will come under clause 3. Even though the judge has erred in this respect, he has done a service in calling our attention to the necessity of proving that the bodily injury suffered by the deceased and found sufficient to cause death was actually intended by the offender. It is not enough if the bodily injury caused is sufficient to cause death. According to the section it is the bodily injury intended by the offender that has to be sufficient to cause death. The Crown has not succeeded in proving the case if it merely shows that the accused intended some bodily injury and that the bodily injury suffered by the deceased was sufficient to cause death: it has still to show that the accused intended to cause the bodily injury actually caused or something equally serious even though his mind was not directed to the consequence of that injury. That was the error into which Allanson, J., who differed from Kulwant Sahay, J., fell. He quite correctly says:

"I am not prepared to hold that it is necessary for the prosecution to prove that the appellant had a knowledge of anatomy, that is, to prove that he had an intention to cause the fracture of the skull. Take illustration (*c*) to S. 300. It would be no defence to an offender coming within that illustration to plead that he did not intend to cut an artery."

But then the Judge proceeds to say:

"He struck the girl what was evidently a heavy blow with a lathi on the top of the head fracturing her skull and killing her instantaneously. The fracture was in the doctor's opinion sufficient in the ordinary course of nature to cause death. I cannot see how on the facts of the present case it can be held that he did not intend to inflict the bodily injury which he actually inflicted. He must be presumed to *know* what the natural consequences of a blow on the head of a child would be."

He definitely misses one step in coming to this conclusion. He does not ask for proof that the fracture or something equally serious was intended. He presumes intention from knowledge which is to be presumed from the consequences! Such a presumption is opposed to the whole scheme of the Code.

The right way of dealing with this question is indicated by what was said by Baguley, J., in *Abor Ahmed* v. *The King*[1] when the case came back to the division bench with the opinion of the full bench. It was a case of a cut with a *dah* on another's ankle with such force that the bones and arteries were cut through. Baguley, J., observed:

"He did *in fact inflict* injury sufficient in the ordinary course of nature to cause death. Can he be imputed with the *intention to cause such injury* or the knowledge that he must inflict such injury? In my opinion this cannot be assumed against him."

He therefore sentenced him to ten years' rigorous imprisonment under the first part of S. 304.

Going back to the judgment of Mr. Justice Kulwant Sahay, there is a second criticism that may be offered. That relates to the words italicised. There is no greater reason for presuming that one who gives another a blow on the head intends to cause such bodily injury as is likely to cause death than for presuming that he intends to cause such bodily injury as is sufficient to cause death. Taking into consideration all the circumstances of the case a conclusion must be arrived at as a fact as to whether the accused had either or any of these intentions; it is not a matter for presumption.

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1. 1937 Rang. 393.

There is a third objection to this judgment and it is somewhat surprising that the judge who had evidently devoted considerable thought to the section should have committed that error. He convicts the accused under the second part of S. 304 on the basis that the act done by the accused comes under the third clause of S. 299 which only requires that the accused should do an act with the knowledge that it is likely to cause death. But the earlier part of the sentence in which he comes to that conclusion makes the conclusion impossible. He says :

"I am of opinion that the injury inflicted upon the girl was inflicted by the appellant with the knowledge that it was likely to cause death but without any intention to cause death."

This finding will make the appellant liable for murder under the second clause because it is a finding that he intentionally caused bodily injury and knew that that bodily injury was likely to cause death. This appears in a more glaring form in the short judgment of Ross, J., to whom it was referred because of the difference of opinion between the other two judges. He starts the judgment by saying :

"I agree with the opinion of Kulwant Sahay, J., that this case falls under the second paragraph of S. 304"

and ends with the words :

—"by striking the girl on the head with a lathi, he undoubtedly intended to cause such bodily injury as was likely to cause death and he was therefore guilty of culpable homicide not amounting to murder."

If he intended to cause bodily injury likely to cause death it comes under the second clause of S. 299 and punishable by the first part of S. 304. Until one comes right down to to the last sentence the judgment of Kulwant Sahay, J., would support a conviction under the first part of S. 304 and that would have been the right conclusion.

There is a great deal to be said for the view expressed in some cases that where death has resulted from bodily injury intentionally caused, conviction under the third

clause of S. 299 is not permissible. (*Nga Nin* v. *Emperor*[1]; *Inder Singh* v. *The Crown*[2] with regard to murder.) Once it is clear that bodily injury was intentionally caused and to that is added a finding that he had knowledge that it was likely to cause death, it automatically becomes a finding for murder under the second clause. Where death has resulted from bodily injury intentionally caused and the conclusion has been reached that it is not murder, then the next step would be to see whether it is culpable homicide under clause 2 of S. 299. If that clause too does not apply, it is not permissible to consider whether clause 3 of S. 299 would apply for the reasons already mentioned. If the nature of the injury caused intentionally will not support a conviction for culpable homicide under S. 299 (*b*), then we have successively to pass on to the sections dealing with grievous hurt, simple hurt and criminal force. Which of these offences it is, will be determined by the injury and the offender's intention or knowledge accompanying it.

Inder Singh v. *The Crown*[2] not only turns on the consideration of the question whether the third clause of S. 300 applies to the facts of the case but also contains a clear statement of the difference between Ss. 299 and 300 on the lines of *R.* v. *Govinda.*[3] The five accused in the case waylaid an enemy of theirs and proceeded to beat him with blunt instruments with a view to take revenge for a fractured leg which one of them got on a previous occasion at the hands of the deceased. On a moderate estimate at least thirty injuries were caused but one peculiar feature was that the head and trunk were carefully avoided. One of the thighs was a mass of bruises and both legs were fractured below the knee. Death was due to hæmorrhage. Dalip Singh, J., found that the intention was to fracture legs and that a conviction could not be sustained either under the second or the third clause of S. 300. But the final conclusion is as

1. 159 I.C. 925. 2. I.L.R. 10 Lah. 477 at 482.
3. I.L.R. 1 Bom. 342.

vulnerable as the conclusion in *Gahbar Pande's case* and ends in exactly the same way. He credits the accused with the knowledge that the beating which they gave was likely to cause death and convicts them under the second part of S. 304.

At this stage two or three recent judgments of the Madras High Court turning on the application of the third clause of S. 300 may be usefully examined. In *Public Prosecutor* v. *Ramaswami Nadar*[1], (Burn and Lakshmana Rao, JJ.), one cannot help wishing that the law had been stated with greater precision though the conclusion arrived at is unimpeachable. The accused had inflicted nine wounds with a sword,one of the wounds on the knee being 4 inches long and 2 inches deep cutting all blood vessels and nerves. In convicting him of murder Burn, J. says :

> "The person who uses the sword or *aruval* chopping at an arm or a leg and by so doing severs the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence is clearly one of murder. See illustration (*c*) to S. 300."

This is a hotchpotch of clauses 2 and 3. It seems to be reasonable to infer that the judge is convicting him under the third clause of murder; if so why bring in the question of his knowledge at all. The only relevant questions are (1) Did the accused intend to chop so deep ? (2) Is the wound sufficient in the ordinary course of nature to cause death ? On the other hand if the judge was convicting under the second clause of S. 300, it is not enough to say that he "must know"; the judge has to go one step further and find that he knew. What an average person is likely to know or 'must know' is only one of the factors for deciding whether the prisoner in the dock actually knew.

The year 1937 has witnessed a number of decisions in Madras with regard to deaths resulting from a single blow on the head which afford a somewhat violent contrast to the views expressed in *Gahbar Pande* v. *King Emperor*.[2] Two of these cases are *Public Prosecutor* v.

1. 190 I.C. 960. 2. I.L.R. 7 Pat. 698.

Koramutla Narasigadu[1] and *Dondapati China Nagadu* v. *Emperor*[2].

In *Public Prosecutor* v. *Koramutla Narasigadu*, the three accused gave the deceased, an old woman, one blow each on the head with sticks because she attempted to interfere in a beating they were giving her brother. One of these blows fractured her skull resulting in death. The Sessions Judge convicted all the three for grievous hurt and acquitted them on the murder charge. Against this acquittal Government appealed. Mr. Justice Horwill said in his judgment :

> "Having found that the accused had voluntarily caused grievous hurt, the learned judge really found for the prosecution most of the ingredients necessary for murder. Now if the assailant causing any grievous hurt, intended to cause that grievous hurt, then undoubtedly under S. 300 (3) he would be guilty of murder, for, in the words of that section, he would have intended to cause bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. One can however be guilty of grievous hurt without intending it if he knows the hurt to be likely ; but a person is considered to intend the probable consequences of his act and a person who hits another on the head with such force as to cause a complicated fracture of the kind actually caused here, must be considered to have intended such bodily injury as would in the ordinary course of nature cause death. If it was clear from the evidence which of the three accused delivered the fatal blow he would have been guilty of murder."

In two ways the views expressed here are unacceptable. First, it is not in every case where grievous hurt is intentionally caused that an offence under the third clause of murder is committed. There are many grievous hurts which are neither sufficient in the ordinary course of nature to cause death not even likely to cause death ; for example, knocking out a tooth or branding on the face or even breaking a bone or putting a joint out of action. According to the view expressed a separate provision to punish grievous hurts is wholly unnecessary because they would all be murders under the third clause. A more

1. 1937 M.W.N. 1124. 2. 1937 M.W.N. 1129.

serious objection is the judge's statement about 'intention.' He will presume intention from knowledge and even without knowledge from the probable consequences.

In *Dondapati China Nagadu* v. *Emperor*[1], the accused as a result of a trivial quarrel gave the deceased, his uncle, a single blow on the head with a lathi in his hand; the lathi at its thickest end was 1¾ inches in diameter and was of the usual type that villagers carry. The blow caused a fracture of the skull resulting in death. The Sessions Judge found him guilty of culpable homicide not amounting to murder and under part 2 of S. 304 sentenced him to six years' rigorous imprisonment. The conviction under part 2 instead of part 1 of S. 304 is undoubtedly wrong. But the Crown's appeal was against the acquittal on the murder charge. Burn, J., held:

> "From the fact that he aimed the blow on the head of the deceased and that he dealt it with such violence it must be inferred that he intended to cause such bodily injury as is sufficient in the ordinary course of nature to cause death. We allow the appeal of the Government and alter the conviction to one for an offence under S. 302. Since the offence was not certainly premeditated and probably the last thing the appellant thought of was that he was about to kill his uncle it is not a case for the infliction of the capital sentence. We sentence him therefore to transportation for life. This is a case in which the local Government may well be moved on behalf of the appellant to remit a portion of the sentence."

It is not known how much of the sentence the local Government remitted. Probably they reduced it to the period of six years originally given by the Sessions Judge. What purpose then was served by Government filing this appeal and the court allowing it coupled with this recommendation for mercy? Presumably it was intended to correct an error of law committed by the Sessions Judge, as a guide to other Sessions Judges for the future. If that was the object, it is submitted that a correct lead has not been given. It is not suggested that this judgment is wrong merely because on practically similar facts the

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1. 1937 M.W.N. 1129.

judges here arrive at a different conclusion with regard to intention from that arrived at in *Gahbar Pande's case.* If intention is rightly found as a fact it must necessarily vary from case to case because what is found is intention actually existing in the mind of the accused in each case. Nor is it suggested that murder cannot be committed by a single blow on the head with a blunt instrument. To lay down the law in that form would be to invite persons contemplating murder to adopt this mode and escape the extreme penalty of the law. It is not unknown that some persons cold-bloodedly scheming murder try to find out what the law on the subject is in order to escape hanging even if the homicide is ultimately traced to them. But the complaint against this judgment is that it may prove misleading. Do the words employed in this judgment constitute a direction to trial courts that when a blow on the head is inflicted with violence they *must* find an intention to cause bodily injury sufficient to cause death? It is the words "must be inferred" that are misleading. The judge says that the last thing that the appellant thought was that he was about to kill his uncle. It could be said with equal certainty, if we are considering the accused's thoughts, that there was nothing in them about serious bodily injury to his uncle.

We may now pass on from the Madras cases and look at two or three others. In *King* v. *Abor Ahmed*[1] there was a reference to a full bench. Roberts, C.J., in answering the reference stated the following wholly unnecessarily :

> "It seems desirable to add a few words on the meaning of the third part of S. 300...... Though in fact an injury may be sufficient in the ordinary course of nature to cause death, it is not murder unless it was intended that the injury should be sufficient in the ordinary course of nature to cause death. Where there was such an intention it was murder."

One can only say that it would have been better not to have added these few words on the meaning of the third clause of S. 300. Any one annoyed by this unnecessary

1. 1937 Rang. 384.

confusion of the law soon found consolation by the repudiation of this interpretation by the Lahore High Court. *Rahman* v. *The Crown*,[1] laid down :

"The *King* v. *Abor Ahmed*[2] which held that to bring the accused person within the four walls of the third clause of S. 300 it is necessary to prove not only that he intentionally inflicted the injury and that that injury was in fact sufficient in the ordinary course of nature to cause death but also that he knew that it was sufficient or intended it to be sufficient, has read into the section something which is not there. Moreover by doing so, it has made the clause a redundancy, for, if this has to be read into the clause it becomes a mere paraphrase of the first clause."

The last is the principal objection. It is not possible to say how 'intention to cause bodily injury intended to be sufficient to cause death' is different from 'intention to cause death.' But Roberts, C.J., is either unaware of this criticism or remains unconverted because in *The King* v. *Aung Nyun*[3] he repeats :

"S. 300 would apply if it were possible to go a step further and say that the offender intended the injury to be sufficient in the ordinary course of nature to cause death."

And Mr. Justice Mya Bu reproduces the same words.

The last case to be considered with reference to the third clause of S. 300 is one where the apparent misapprehension of the word 'intention' has led to undeserved leniency to the accused. In *Emperor* v. *Nag Kyank Sein*[4] the accused throttled his wife so that she died and then attempted to commit suicide. The Court took a somewhat unusual view of the occurrence :

"It was quite possible that while the accused and the deceased, his wife, were by themselves in the house, something occurred which made the respondent attack his wife by squeezing her neck for the purpose of causing some injury to her; it is extremely difficult to hold that he squeezed his wife's throat with the intention of killing her. On the other hand it is quite clear that he used considerable force and violence so that she was suffocated to death. Such an act must have been *known* to the respondent to be an act likely to cause the death of his wife and he must be presumed to have *intended to cause injury likely to cause death* in throttling his wife."

1. I.L.R. 1939 Lah. 77.
2. 1937 Rang. 384.
3. 1940 Rang. 441 at 420.
4. 172 I.C. 179.

If the judge had carefully considered the words italicised in his judgment, he should have convicted the accused of murder; but he only convicted him for culpable homicide not amounting to murder. It no doubt is possible to throttle without intending to kill but ordinarily throttling is as clear an indication of the existence of the intention to kill as decapitation or hanging.

There still remains to be considered the fourth clause of murder and its difference from the third clause of culpable homicide. The accused need not have intended or caused any bodily injury in these cases and it has been seen that these clauses may not apply at all if bodily injury is intended. The number of convictions under the fourth clause of murder is small compared with convictions under other clauses. The wording of this clause makes the difference between it and the 3rd clause of culpable homicide reasonably clear. Since *Gora Chand Gopees'* case the difference has been recognised to be one of degree of probability. In addition to this a person accused under the 4th clause of S. 300 must be shown to have acted without any excuse for incurring this serious risk to human life.

Among the recent cases that were discussed in this article some were appeals against acquittal on charges of murder. One wonders if the number of these appeals has not recently been much larger than in the past. The Privy Council has stated in *Sheo Swarup* v. *King-Emperor*[1] that there is no distinction between the powers of the High Court when hearing an appeal from an order of acquittal and when hearing an appeal from conviction. The Privy Council also pointed out that there was no foundation for the view taken by some courts in India that the High Court could interfere with an order of acquittal only when the trial Court had 'obstinately blundered'. Has this judgment been responsible for the increase in the number of appeals against acquittal filed and allowed? When the Privy Council said that the

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1. I.L.R. 56 All. 645.

High Court could interfere in cases other than those of obstinate blundering, they certainly did not say that the High Court should interfere in every case in which it would not have acquitted had it been the trial court. The law which reserves the power of filing appeals against acquittal to Government imposes a special responsibility on them. That the investigating police-officers are dissatisfied with the acquittal, that the Law Officers of the Crown consider that the High Court may take a different view of the facts are not by themselves sufficient reasons for filing an appeal against acquittal : Government must be satisfied that such an appeal is necessary in the interests of justice. The Privy Council judgment does not encourage these appeals nor does it deserve the criticism that Sir D'Arcy Reilly levelled against it in a recent judgment of the Mysore High Court.[1] The judgment of the Privy Council need not have made any difference to the long-established mode of dealing with appeals against acquittal if only judges bear in mind the directions of the Privy Council who said in this case that the High Court should and will always give proper weight to (1) the views of the trial judge; (2) the presumption of innocence in favour of the accused which is certainly not weakened by the fact that he has been acquitted at the trial ; (3) the right of the accused to the benefit of any doubt and (4) the slowness of an appellate court in disturbing a finding of fact by a judge who has seen the witnesses.

The authors of the Code visualised over a century ago the growth of a mass of case law in interpreting the Code :

"Such questions will certainly arise, and unless proper precautions be taken, the decisions on such questions will accumulate till they form a body of law of greater bulk than that which has been adopted by the legislature. Nor is this the worst. While the judicial system of British India continues to be what it now is, these decisions will render the law not only bulky, but uncertain and contradictory. There are at present eight chief courts...... Every one of these tribunals is perfectly independent of the others. Every one of them is at liberty to put its own construction on the law ; and

1. 1941 M.W.N. Journal ii.

it is not to be expected that they will always adopt the same construction. Under so inconvenient a system there will inevitably be, in the course of a few years, a large collection of decisions opposed to each other and all of equal authority."

The authors of the Code suggested two remedies for it: (1) a common Court of Appeal and (2) a periodic revision of the Code to settle doubtful questions; "No point of law" they said, "ought to continue to be a doubtful point more than three or four years."

An All-India Court of Criminal Appeal will have all the merits and demerits of a Supreme Court for India and need not therefore be specially considered. But a general revision of the Penal Code is long over-due. Enough has been seen of a bit of the case law on one crime to justify such a revision. Such a revision is required not only for improving the code in the light of the mass of case law that has accumulated but also for the purpose for which most European countries have revised or are in the process of revising their criminal codes. The advancement in the last half a century of the science of criminology and penology demands a revision of our ideas of crime and its treatment.

THREE PIONEERS IN THE BRITISH EVOLUTION OF HINDU LAW

BY

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It is commonly assumed that the Hindu law which is administered in the British Courts is the Hindu law which is laid down in the Institutes of the Dharma Shastra. Every experienced lawyer knows that this assumption is only vaguely and partially correct. The ordinances of the Hindu law-givers are not enforced by the Courts in the same manner as the enactment of a legislature. The Smritis and their commentaries have no doubt provided British Courts with the raw material for their Hindu law. But the system itself is a synthetic *corpus juris* evolved by judicial development in the manner familiar to English lawyers. This process of development has necessarily been controlled by the conditions which govern the British system of judicature. The method of evolution has been practical rather than scientific. English lawyer and Hindu Pandit have both brought their contribution. The Hindu elements have been derived from various sources, ancient texts, medieval speculation, modern usage. The manner of the development exhibits all those features which are supposed to be characteristic of the British method of legal evolution, the same cautious broadening of the law from precedent to precedent, the same reluctance to depart from rules once established, the same audacious indifference to abstract logic. A system which has grown up in this way cannot be explained satisfactorily in terms of mere juristic theory. If it is to be understood correctly

some knowledge of its history is essential. An attempt has been made in the present essay to show the vicissitudes through which Hindu law has had to pass in the early years of its British evolution.

SIR WILLIAM JONES

In the year 1783 Sir William Jones came out to India as a Judge of the Supreme Court at Calcutta. This learned lawyer was interested in Indian law and culture even before he came to India, and was greatly dissatisfied with the conditions under which Hindu law was administered by European Judges. The Judges of the Supreme Court were English barristers who knew exceedingly little regarding the laws and customs of the country. The only English text book of Hindu law which was available in those days was Halhed's Code of Gentoo laws, a translation of a Digest of Hindu law compiled for the use of the Company's courts by a committee of Pandits at the instance of Warren Hastings. The original Sanskrit treatise was probably a work of considerable merit. It is said to have been adopted by the Sikh ruler Ranjit Singh as the official manual of Hindu law in his State. But no one could be found to translate the work directly into English, and the expedient had to be adopted of translating the Sanskrit treatise into Persian, and getting the Persian rendering translated into English by an official in the Company's service named Halhed. This translation soon fell into great discredit. Sir William Jones came to the conclusion that another effort should be made by the Company's Government, under conditions that would ensure better results than in the case of Halhed's Code, to secure an officially authoritative Digest of Hindu law for the use of European Judges. In the year 1788 he unfolded a plan for this purpose in a letter addressed to the Government of Lord Cornwallis. The letter is a document of great interest, for it gives us an idea of the vague assumptions made by English Judges and administrators in those days regarding the basis and character of Hindu law.

"Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves accept as the rules of their conduct and engagements in civil life; nor could anything be wiser than, by a legislative act, to assure the Hindu and Muselman subjects of Great Britain, that the private law which they severally hold sacred, and a violation of which they would have thought the most grievous oppression should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance. So far the principle of decision appears perfectly clear; but the difficulty lies in the application of the principle to practice; for the Hindu and Muselman laws are locked up for the most part in two very difficult languages, Sanscrit and Arabic, which few Europeans will ever learn because neither of them leads to any advantage in worldly pursuits. If we had a complete Digest of Hindu and Muhammadan laws after the model of Justinian's inestimable Pandects compiled by the most learned of the native lawyers, with an accurate verbal translation of it into English, and if copies of the work were deposited in the offices of the Sadr Dewany Adawlat and of the Supreme Court, we should rarely be at a loss for principles and rules of law applicable to the cases before us and should never perhaps be led astray by the Pundits or the Maulvies who would hardly venture to impose on us when their imposition might so easily be detected. The great work of which Justinian has the credit consists of texts collected from law books of approved authority which in his time were extant at Rome and those texts are digested according to a scientifical analysis, the names of the original authors and the titles of their several books being constantly cited with reference even to the parts of their works from which the different passages were selected. Although it comprehends the whole system of jurisprudence, public private and criminal, yet that vast compilation was finished, we are told in three years. It would not be unworthy of a British Government to give the natives of these Indian Provinces a permanent security for the due administration of justice among them similar to that which Justinian gave to his Greek and Roman subjects, but our compilation would require far less labour and might be completed with far greater exactness in as short a time, since it would be confined to the laws of contracts and inheritances which are of the most extensive use in private life, and of which the legislature has limited the decisions of the Supreme Court in causes between the native parties." (*Quoted in the preface to Colebrooke's Digest.*)

It was probably a natural thing for an English lawyer in the position of Sir William Jones to institute a comparison between Hindu law and Roman law, but the

planning of a Digest of Hindu law after the model of Justinian's Pandects was clearly founded on a misapprehension. How very superficial the analogy is, will appear clearly if we peruse the instructions given by Justinian to the compilers of his Digest and consider whether instructions on similar lines could properly be given to the compilers of a Digest of Hindu law by the Government of the East India Company. The following extracts from the Commission given to Tribonian and his colleagues by the Emperor will bring out the distinction sufficiently clearly for our present purpose.

> " Do not absolutely reject the notes of Ulpian, of Paulus, and of Marcian on Papinian, which were formerly denuded of all authority on account of the honour paid to the most illustrious Papinian, but do not hesitate to take and lay down as law whatever you shall think fit. The decision of all the authors you quote will have authority just as if they emanated from the Imperial constitutions and were given forth by our Divine Breath.
>
> " Eliminate everything which may appear to you out of place, superfluous or bad. The corrections you make even contrary to the ancient laws will have legal force, and let no one dare by making comparisons of ancient manuscripts to impute any imperfection to anything which you shall have written. The sanction which we give it is not divided between these and those fragments of the founders of the laws but comes entirely from us, entirely from the choice we make. How should antiquity abrogate our laws." (*Ortolan's History of Roman Law, Page 356*).

To a modern Hindu lawyer it must be perfectly obvious that the spirit in which the above instructions were issued is directly opposed to the spirit underlying the administration of Hindu law in the British Courts. The majestic direction, Do not hesitate to lay down as law whatever you shall think fit, is the completest possible antithesis to the policy adopted by the Company's Government in the matter of personal law. Justinian's Digest was a great deal more than a mere collection of authorities. It was a juristic synthesis of the opinions of earlier Roman lawyers carried out substantially in a spirit of legislation. Though described as a Digest the work was substantially

a Code. It was part of a scheme by which a *corpus juris civilis* was to be established which should be self-consistent and exhaustive. Antinomies of all kinds were to be eliminated. A rampart was to be built round the laws, to use Justinian's own figure of speech, so that the Code, the Digest and the Institutes were to contain the law, the whole law, and nothing but the law. A scheme like this could have no application to the systematisation of Hindu law under British rule. The compiler of a Digest of Hindu law would not be able to eliminate antinomies and produce a self-consistent code, for the rules laid down in the law-books of the Dharma Shastra are frequently in disagreement with one another, and in view of the Divine authority attributed equally to all the law-givers a compiler appointed by the British Government would have no authority to effect a final and authotative reconciliation. Nor would he be able to erect a rampart round the law, because the policy of the Company's Government in the matter of personal law was essentially a policy of non-interference, and a Digest of texts collected from the law books of the Dharma Shastra could not possibly present with completeness the legal ideas prevailing in practice among all the communities included within the vaguely defined boundaries of Hinduism. Clearly Sir William Jones looked forward to a Digest which would present Hindu law with certainty and a fair approximation to codified unity, not a bewildering collection of conflicting authorities, law-giver against law-giver, commentator against commentator. On the other hand it is equally clear that he did not contemplate investing a committee of Hindu Pandits with the authority which Justinian gave to Tribonian and his colleagues. The truth of the matter is merely this, that Sir William Jones had no clear notion of the character and content of the law of the Dharma Shastra. He appears to have taken it for granted, as British administrators of his day appear to have all done, firstly that Hindu law was synonymous with the law of the Dharma Shastras, and secondly, that the law of the Dharma Shastras was one single Code of revealed

enactments, self-consistent as between its different exponents, and stereotyped beyond all possibility of alteration by the religious sanction on which it rested. In this view no question entered into his scheme, either of conflicts between the authorities, or of differences between ancient precept and modern practice. The only thing necessary for the establishment of Hindu law on a satisfactory footing was to consolidate in one single text book, with the guidance of competent Hindu scholars, an exhaustive collection of authorities gathered together from the text books of Brahminical jurisprudence.

The suggestion made by Sir William Jones was accepted with grateful appreciation by the Government of Lord Cornwallis. It was decided that the projected Digest should be compiled in Sanskrit as proposed by Sir William Jones, and then translated into English for the benefit of the British Courts. A learned Pandit named Jagannatha, greatly proficient in the Hindu science of disputation, and for that reason described as Tarka Panchanana, lion of dialectics, was put in principal charge of the writing of the original Sanskrit treatise. The plan of the treatise is said to have been fixed by Sir William Jones himself, who also undertook to translate the work into English when it was completed.

Jagannatha's compilation, bearing the high-sounding title, Vivada Bhangarnava—ocean of legal solutions—was completed in 1794. As Sir William Jones passed away in the same year, another translator had to be found reasonably proficient in Sanskrit and English. The choice of the Company's Government for this task fell on a young official in their service, Henry Thomas Colebrooke, who was to become later on a renowned orientalist and one of the principal makers of modern Hindu law. The English version was completed in about two years. When it was published eventually it was received with great disappoint-

ment.[1] The Digest was found to be, as a pungent critic remarked, the best possible book for a lawyer who had to discover arguments but the worst possible book for a judge who had to come to a conclusion. But the importance of Jagannatha's work in the evolution of modern Hindu law really lies in the disillusionment that it brought about. Contemporary critics took Jagannatha to task unjustly for his quibbling and wavering, not realising that Jagannatha had executed his commission conscientiously, and that it was no fault of his if he could not do for Hindu law what Tribonian could do for Roman law. But a great service was done to the cause of Hindu law when Jagannatha exposed the falsity of the view, which British administrators had taken for granted, that there was one single Hindu law laid down in the law books of the Dharma Shastra. Henceforward the basis of authority in matters of Hindu law was gradually shifted from the scriptural enactments of the law-givers to the legal ideas actually accepted and acted upon by the people in their daily lives. The personal law governing Hindu disputes, which Warren Hastings and Sir William Jones had regarded as a unitary Code of revealed laws invested with an objective legal authority, came gradually to be defined as a many-sided jurisprudence comprising different compartments of legal doctrine, each of them deriving its authority within its own regional sphere from the sanction of customary law.

Henry Thomas Colebrooke

Jagannatha's Digest brought Colebrooke into the domain of Hindu law. This scholarly Englishman had come to India as a writer in the service of the company in the year 1783 at the age of 18. When he was sum-

1. The original Sanskrit Digest compiled by Jagannatha does not appear to have been ever published. This is unfortunate, for the work is of considerable merit. I have compared Colebrooke's version with a manuscript of the original work in the library of the Madras High Court and another in the Government Oriental Manuscripts Library, Madras. The translation is in many places amazingly incorrect. It is to be hoped that a place will be found for the Digest of Jagannatha in the Ashutosh Sanskrit Series proposed to be published in commemoration of Sir Ashutosh Mukherjee.

moned to the task of translating the Digest of Jagannatha he had just become eligible for a place corresponding to a District Judgeship of the present day. It was decided that he should attend to his regular duties as Judge and also carry out the special commission entrusted to him. In order to give him reasonably full facilities and a suitable environment for his literary work he was appointed in accordance with his own wishes to the Judgeship of the Company's Court at Mirzapur, from where, on account of the close proximity of the place to the great centre of Hindu learning, Benares, he would have valuable facilities for studying and discussing questions of Hindu law with the help of learned Hindu Pandits. This circumstance had an important influence on the subsequent development of Hindu law, for Colebrooke found that the Pandits of Benares attached great importance to the views of a writer named Vijnaneswara, but much less importance was attached to Vijnaneswara by Jagannatha and other Bengal Hindu lawyers. Examining the reasons for this, with the aid of his own Pandits, he came to the conclusion that Hindu jurisprudence is divided into two schools of doctrine, one prevailing in Bengal and representing the views of those who interpreted the ancient ordinances in the light of the Nyaya system, the Hindu science of dialectics, the other prevailing in Benares and other places and representing the views of those who construed the sacred institutes in the light of the Mimamsa, the Hindu Science of scriptural interpretation. This was the crude basis of the theory of Schools of Hindu law, which underwent a great deal of refinement in later years. The details of this theory, as he understood it, were put down in a memorandum which was meant to be incorporated in an independent Digest of Hindu Law which Colebrooke had at this time in contemplation. The note, which is entitled 'Account by H.T. Colebrooke, Esq., of the Hindu Schools of law' was later on sent to Sir Thomas Strange, and is printed as an appendix to Sir Thomas Strange's Hindu Law. It is also printed in the biography of Colebrooke by his son Sir T. E. Colebrooke.

The document is of great interest, for it is the earliest and most systematic exposition, by the person who was for all practical purposes its originator, of the theory that Hindu law is a composite system comprising independent divisions each of which has its own defined sphere of regional authority.

For the purpose of helping him in the preparation of his own projected Digest, Colebrooke engaged several Pandits, one of whom Balasarman Payagunde, appears to have been the real author of the commentary on the Mitakshara known as the Balambhatti, which is generally supposed to have been written by a female author. In a letter written to Sir Thomas Strange in 1823[1] he states that the Digest had been complete in the original Sanskrit version for several years, and that the translation also was in a state of great forwardness, but that he would allow the work to remain unpublished unless he felt that it was really called for. The work in fact, was never published[2]. It was planned at a time when his own theory of Hindu law had not yet taken definite shape, and when the theory of Schools crystallised in his own mind he became convinced that a new Digest could serve no useful purpose, and that he would be doing greater service to the administration of Hindu law by publishing translations of the two treatises which he regarded as of paramount importance for practical purposes, the Dayabhaga of Jimuta Vahana and the Mitakshara of Vijnaneswara. The translations by him of these two books were published in 1810 and over-shadowed in course of time all the other available authorities in Hindu law. In his preface to these translations Colebrooke stated his conclusions regarding the existence of different schools of Hindu law and the regional autho-

1. Life of Colebrooke by his son Sir T. E. Colebrooke, Page 345.

2. The Digest must have been included in the manuscripts which Colebrooke presented to the library of the East India Company. Kane states in his History of Dharma Shastra that the Catalogue of the India Office Library refers to a treatise described as Dharma Shastra Sangraha, compiled by Balasarman Payagunde, who describes himself as a person patronised by Colebrooke कोलब्रुकसाहेबाश्रयजीविक: Kane's History of Dharma Shastra, page, 461.

rity of different commentaries in different parts of the country. Though these conclusions have had to be qualified in various ways in the light of subsequent experience, they determined finally the direction in which Hindu law was to develop in the British Courts. As Judge of the Bengal Sudder Dewany Adalat for several years from the very inauguration of that Court as an independent tribunal by Lord Wellesley in 1801, and as trusted adviser of Judges and officials in other Provinces, notably of Sir Thomas Strange, Chief Justice of the Madras Supreme Court, Colebrooke had various opportunities of influencing the development of Hindu law practically in its day to day administration. His theory of Schools of Hindu law was brought into increasing vogue by judicial pronouncements and writers of text books like Sir Thomas Strange and William Macnaghten and was incontrovertibly established, about the middle of the last century, by the judgment of the Privy Council in the *Ramnad case.*[1]

Contemporary writers appear to have subjected Colebrooke's views to sharp criticism, and the manner in which Colebrooke reacted to those criticisms shows that he did not fully realise the far-reaching significance of his own conclusions. In a note by him printed in Sir Thomas Strange's Hindu law he refers to an anonymous critic who objected to his talking of the Bengal School and the Benares School holding different laws 'as if the question were of taste or of the fine arts.' Against this criticism he defended himself in the following terms :

"I am yet to learn why schools are to be restricted to matters of taste and the fine arts ; or why jurisprudence is not to be taught or studied in schools. Nor am I aware that any more appropriate term can be chosen, when speaking of diversity of doctrine deduced by a varied train of reasoning and interpretation from the same premises I may remark, as I pass, that the anonymous author has misquoted me. I am not found talking of schools holding different laws, but different doctrines, and different opinions. Can he be ignorant that the Hindu name comprises various nations differing in languages and in manners as much as the various nations of Christian Europe ? It is

1. 12 Moo. I.A. 397.

no more to be wondered at that law should be different in Bengal and Benares than that it is so in Germany and Spain."

This is very unsatisfactory reasoning. The objection to the use of the word 'Schools' consisted in the fact that it contradicted the postulate of an objective Hindu law based on scriptural ordinances. Colebrooke did not meet this criticism fairly. The statement that the distinction between the Schools is a distinction of doctrines and opinions, not a distinction of laws, is deplorable casuistry. If the jurisdiction of Hindu law is cut up into regional divisions, the conclusions adopted by the local commentaries being regarded as final regardless of the soundness of their textual reasoning, there is no point in shirking the necessary implication that the difference is one of law and not merely of doctrine or opinion. The point is in fact conceded by Colebrooke in substance, but he appears to have felt some difficulty in conceding it explicitly. The explanation is to be found in the fact that Colebrooke's views represented a transitional phase in the development of Hindu law and like all transitional views were to some extent illogical. The division into Schools implied that Hindu law was relative, not absolute. In the light of Colebrooke's theory it was no longer possible to affirm finally, without reference to the parties concerned in the controversy, what the Hindu law was in regard to a particular matter. Hindu law had become, in other words a law of usage, it was no longer properly speaking a *lex scripta*. Colebrooke did not see this with sufficient clearness. He appreciated the problem of Indian law more clearly than Sir William Jones and Warren Hastings, but not with the realism of Mountstuart Elphinstone or Sir Erskine Perry. He clung to the old authoritarian view that Hindu law was a law of revealed ordinances. He pleaded for recognition of diversities within the domain of Hindu law, but only within the ambit of the Dharma Shastra. His realism did not carry him to the length of recognising that Hinduism is a whole of which Brahminical Hinduism is merely a part, and that Hindu law is wider than the law of the Dharma Shastra. It is

necessary to note this clearly, for sufficient attention is not always paid to the vicissitudes through which Hindu law has had to pass before it assumed its present character. The sixty years and more which elapsed between the publication of Colebrooke's translation of Jagannatha's Digest and the judgment of the Privy Council in the Ramnad case, was really one long period of gestation. Even after the judgment in the Ramnad case, though the basic principles were finally established, the confused and self-contradictory ideology of the earlier days still lingered. It has not completely disappeared as a matter of fact, even at the present day.

MOUNTSTUART ELPHINSTONE

Mountstuart Elphinstone, Governor of Bombay from 1819 to 1827, represents the starting point of a new line of thought in the British evolution of Hindu law. The dimensions of the Bombay Presidency had been greatly enlarged by the results of the Third Maratha War when he became Governor, and the foundations of British administration had to be laid in large new tracts of territory. The principle had become well established that the administration of civil justice in the British Courts should be based on the fullest possible recognition of personal law, but the experience of Bengal had shown that the practical application of this principle was not a very simple matter. The formula devised by Warren Hastings in 1772, that Hindu disputes should be decided invariably in accordance with the law of the Dharma Shastra, had been shown to be seriously inadequate. The Fatwahs of the Pandits appeared to show that the written Hindu law was exceedingly vague and in many respects obsolete, so much so that Francis Macnaghten, when he published his Considerations on Hindu law in 1824, put on the title page of his book a motto taken from the Institutes of Coke, *Misera est servitus ubi jus est vagum aut incertum*, and roundly stated in the preface to his book that it was impossible to adjudge dispute in accordance with Hindu law. Mountstuart Elphinstone

approached the problem of Hindu law from a new angle. He was an enthusiastic Benthamite, a great believer in codification. But he desired to get a code of Hindu law based as far as possible on the laws actually in force in Hindu society. One of his first acts as Governor was the appointment of a committee to investigate thoroughly the customs and usages of the people. In a minute of 1823 he formulated his views and his plan for the systematisation of Hindu law.

"The Dharma Shastra, it is understood, is a collection of ancient treatises neither clear nor consistent in themselves, and now buried under a heap of more modern commentaries, the whole beyond the knowledge of perhaps the most learned Pandits, and every part wholly unknown to the people who live under it. Its place is supplied in many cases by known customs, founded indeed on the Dharma Shastra, but modified by the convenience of different castes or communities, and no longer deriving authority from any written text. The uncertainty of all decisions obtained from such sources must be obvious, especially when required for the guidance of a foreign judge, himself a stranger both to the written law and to the usage which in cases supplies its place. The usual resource, when the Shastra has to be consulted, is to refer to the Pandit of the Court, on whose integrity the justice of the decision must in the first instance depend. Supposing however, that he is honest and learned, he has the choice of a variety of books to quote from, and in many instances the same book has a variety of decisions on the same question. When the question depends on customs, the evil is at least as great. The law is then to be collected from the examinations of private individuals ; the looseness of tradition must lead to contrary opinions ; and even when any rule is established, it is likely to be too vague to be easily applied to the case in point. Add to this the chance of corruption, faction favour, and other sources of partiality among witnesses.

"There are but two courses by which a remedy can be applied. The first is to make a new code founded entirely on general principles applicable to all ages and nations. The second is to endeavour to compile a complete and consistent code from the mass of written law and the fragments of tradition, determining on general principles of jurisprudence those points where the Hindu books and traditions present only conflicting authorities, and perhaps supplying on similar principles any glaring deficiencies that may remain when the matter for compilation has been exhausted. The first of these courses, if otherwise expedient, is rendered entirely impracticable here by the attachment of the natives to their own institutions, and by the degree

to which their laws are interwoven with their religion and manners. The second plan, therefore, is the only one which it is in our power to pursue. The first step towards the accomplishment of this object appears to be to ascertain in each district whether there is any book of acknowledged authority, either for the whole or for any branch of the law. The next is to ascertain what exceptions there are to the written authorities and what customs and conventions exist independent of them. The best modes of conducting these inquiries are—first, to examine the Shastris, the heads of castes, and other persons likely to be acquainted either with the law, the custom of castes, or the public opinion regarding the authority attached to each; and second, to extract from the records of the courts of justice the information already obtained on these subjects in the course of judicial investigation." (*Mountstuart Elphinstone by J. S. Cotton, Rulers of India Series, Page 182*)

The author of this minute had seen clearly what administrators before Colebrooke had not seen at all, and even Colebrooke had seen only dimly, namely, the difficulties involved in the administration of personal law on account of the lack of means by which British Courts could discover the legal ideas actually prevailing among the people. The tribunals which functioned in the days of Hindu sovereignty were in a very different position. They were conversant with the usages of the people and could decide matters on the strength of their own knowledge. In the widely different conditions of British rule it is impossible for a Judge, and it would be improper even if it were possible, to proceed to decision on the basis of customary law except on the strength of usages brought to the notice of the Court through the ordinary media of judicial proof.

The ambitious project of reducing the whole body of Hindu law to writing, on the basis of actual investigation of existing conditions, was never realised. Useful manuals of customary law were no doubt published, such as those by Borradaile and Steele, but the big official enterprise planned by Elphinstone did not materialise. It was probably impracticable. But there can be no doubt that Mountstuart Elphinstone gave a new orientation to the administration of personal law, not merely in the Bombay Presidency but in British India generally. In the year

1827, the last year of his Governorship, a new Code of Regulations drawn up by him came into force in the Bombay Presidency. One of them, Regulation IV, laid down by S. 26 the following rule for the adjudication of civil disputes in the Company's Courts in the Bombay Presidency :

> "The law to be observed in the trial of suits shall be Acts of Parliament and the Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose ; if none such appears, the law of the defendant and in the absence of specific law and usage, justice, equity and good conscience."

This Regulation is still the law in force in the Mofussil Courts of the Bombay Presidency.

Fifty five years had passed since the Courts of the East India Company had begun to adjudge disputes concerning the Hindu and Muhammadan inhabitants of the country. The distance traversed during this period in terms of legal development can be judged by contrasting the terms in which the rule of personal law was inaugurated by Warren Hastings in 1772 with the terms of the Regulation quoted above. The former had laid down that Hindu and Muhammadan disputes were to be decided *invariably* in accordance with the law of the Shastra and the law of the Koran. Under the Regulation of Mountstuart Elphinstone on the other hand, next to enacted law the foremost place was given to the usages of the country as the basis of judicial decision.

The expression, law of the defendant, occurring in the Regulation is taken from the provisions made by Parliament and letters patent for the chartered courts. These provisions prescribed the application of Hindu law in the case of Hindus and Muhammadan law in the case of Muhammadans, and in cases of conflict of laws laid down that the law of the defendant was to be adopted as the basis of decision. It will be seen that the rule regarding the law of the defendant adequately provides for both the contingencies referred to, for, if both the

parties are governed by the same law that law also may be described as the law of the defendant. This is the meaning of the formula adopted in the Regulation of 1827. The reference to the law of the defendant is to the written personal law of the parties. But this law is expressly subordinated to established customary law. Students of Hindu law know that the law in Bombay diverges from the law of the Dharma Shastra much more widely than the law elsewhere, and approximates more closely to the existing laws of the people. But it is not widely known that this distinction between Bombay and other Provinces is due to the turn given to the administration of the law in Bombay by Mountstuart Elphinstone more than a century ago.

The paramount authority of usage in the domain of personal law, adopted in Bombay in 1827, was extended to the territories which were subsequently brought under British Rule. When the Punjab was annexed in 1849 the administration of justice was established there on the same basis as in Bombay. The Hindus in this part of India did not rigidly adhere to the law of the Dharma Shastra. The Muslims, similarly, were much less under the influence of the Koranic law than their co-religionists in other parts of the country. British officers were therefore instructed to ascertain and give effect, as far as possible, to the customs prevailing among the people. This principle, laid down originally by executive orders, was embodied in definite statutory enactment when the Punjab Laws Act was passed in 1872. S. 5 of the Act puts custom in the forefront of authority. The *lex scripta*, Brahminical or Koranic, occupies a secondary place, being subordinated by express enactment to established customary law.

THE POSITION OF THE STATES IN THE INDIAN FEDERATION

BY

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It has been argued by several well-known jurists that equality of status is a fundamental and essential characteristic of the constituent units of a Federation. According to Laband, "the Federal State is a Republic of which the States themselves are citizens and in which the sovereign power is exercised by the collectivity of the States considered as a unity. Thus the German Empire, for example, is neither an Empire of forty million subjects nor a democracy of forty million citizens; it is a Republic of twenty-five members which collectively exercise the supreme power."[1] There is, no doubt, an element of truth in this contention. The Federal Constitution of Venezuela, for instance, expressly provides that "the States which comprise the United States of Venezuela are autonomous and equal amongst themselves as political entities." This principle of equality has been recognised by several Federal Constitutions in the matter of representation of the component States. Equality of representation in the Upper House of the Federal Legislature is a cardinal feature of the constitutions of Switzerland, the United States of America, Mexico, Venezuela, the Argentine, and Brazil. This, however, does not represent the whole truth. It is not essential that in every Federation the

1. Laband, *Il Diritto Publico dell' Impero Germanico.* Torino. 1914.

constituent units should exercise and enjoy equal power and authority. On the contrary, under the German Federation of 1871, some of the important States like Bavaria, Wurtemburg and Baden had special rights and powers which lay outside the competence of the other States, but there was no difference in point of law between the position of these States and that of the other units of the German Reich. The Federal Constitution outlined in the Government of India Act, 1935, presents, however, a very striking feature. Under the proposed Federation of India there will be two different and distinct categories of component units, differing not only in the *quantum* of their powers but also in regard to their legal status and position.

The first fundamental difference between the States and the Provinces which will constitute the Federation of India will be that so far as the States are concerned, the provisions of the Government of India Act, 1935, will not apply to them *proprio vigore* but by virtue of their Instruments of Accession. The accession of the States will be founded upon an agreement between them and the Crown. It is, therefore, clear that in the interpretation of the provisions of the Act in their application to the Federated States, the Instruments of Accession must be the governing factor and must, therefore, control the meaning of the various sections of the Act. In the Provinces, on the other hand, the Act will apply automatically, and must therefore be of paramount importance. Whereas in the case of the States the basis of accession will be purely contractual, in the Provinces it will be entirely and exclusively statutory. The natural consequence of this difference is that in regard to the Provinces the authority of the Imperial Parliament will continue to be exercised. Indeed, this authority has been expressly preserved in S. 110 (*a*) of the Government of India Act which reads as follows : "Nothing in this Act shall be taken to affect the power of Parliament to legislate for British India or any part thereof." The effect of this

clause is certainly not to give Parliament power to legislate for a Federated State. If Parliament did legislate for British India upon a federal subject, such legislation will not be operative in the States, and any existing federal law upon that subject will continue to remain in force in the States.

At present the States lie entirely outside the ambit of the legislative authority of the Imperial Parliament. No statute of Parliament has any operative effect in any Indian State except in cases where specific power has been delegated to the Crown in this behalf. Dealing with the question of the validity of an Act of Parliament in the State of Travancore, Mr. J. D. Mayne, an eminent authority on Indian Law, observed as follows: "It cannot of course go beyond the powers given by the statute; and the statute, though binding on all British subjects, has no force against the Sovereign of Travancore or his servants, who are not subject to the authority of the British Parliament. Even if the statute purported in express terms to take away the jurisdiction previously exercised by the Courts of Travancore, it would be simply inoperative against them. Parliament is as incapable of taking away the powers of a Court in Travancore as it is of dealing with the Courts of France." This view of the position of the States *vis-a-vis* the Imperial Parliament has been accepted by the Judicial Committee of the Privy Council in *Hemchand Devchand* v. *Azam Sakarlal Chhotamall*[1]. This position will remain unaltered under the new Constitution. The Government of India Act, 1935, will be applicable in the States not as an Act of Parliament but by virtue of the assent of the States. It is clear from S. 6 of the Act that the States which accede to the Federation will accept the Act to the extent to which it affects them, but the Act will not be binding on them as such, and any failure on the part of the States to carry out their federal obligations will amount to a breach of agreement and not a breach of a statute. The same

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1. (1906) A.C. 213 at 237.

observation applies to the amendments which the Imperial Parliament may make to the clauses specified in the Second Schedule of the Act.

One of the essential characteristics of a Federation is the division of the totality of sovereign powers between the central government and the component units. This distribution of powers may be effected in two different ways. In the first place, a Federal Constitution may expressly and specifically enumerate the powers of the Federal Government and leave the remainder in the hands of the constituent units. This is the method which has been adopted in all Federal Constitutions except the British North America Act of 1867 which established the Federation of Canada. For instance, Art. 101 of the Constitution of the Argentine provides : " the Provinces enjoy all the powers which have not been delegated by the Constitution to the Federal Government."[1] The second method of distribution of power is to be found in the Canadian Constitution. S. 92 of the British North America Act specifically enumerates the legislative powers which may be exclusively exercised by the Provinces. S. 91 provides that the Dominion Parliament may legislate for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects exclusively assigned to the provincial legislatures. This is supplemented, *ex magna cautela*, by a long list of subjects which are to be within the exclusive competence of the Dominion Parliament. It is, therefore, clear that in Canada the residuary powers of governance have been assigned to the Dominion, whereas in all other Federal Constitutions the component States retain and exercise the residuary powers.

The Government of India Act, 1935, presents a curious combination of the two different methods of distribution of power described above. Under this Act the Federal authorities will be competent to exercise in regard to a Federated State only those powers

1. Matienzo, *Le gouvernement représentatif fédéral de la Republic Argentine*, Paris, 1912.

which have been expressly conferred on them by the Instrument of Accession. S. 6 specifically authorises the Ruler of a Federated State to define the matters with respect to which the Federal Legislature may make laws for his State. He is also competent to place limitations on the exercise of the legislative authority delegated by him to the Federal Legislature. Similarly he has the power to impose restrictions on the executive authority of the Federation. It is therefore clear that the residuary powers of governance will continue to be vested in the Federated States under the new Constitution.

The position of the Provinces is, however, entirely different. The question of delegation of powers did not arise in their case, as they had no legislative powers of their own to surrender, being entirely subordinate to the Central Legislature of British India and to the Imperial Parliament. Unlike the States they are not contracting parties at all. The consequence is that under the new Constitution they are able to exercise only those powers which have been expressly conferred on them, the residuary powers remaining with the Federal Government subject to the control of the Imperial Parliament. For instance, in cases of grave emergency the Federal Legislature has, under the Act, the power to make laws for a province or any part thereof with respect to any of the matters which lie exclusively within the legislative authority of the Provinces. It is also clear from S. 104 of the Act that the residuary powers of legislation are vested in the Federal Government, since this section authorises the Governor-General, the head of the Federal Government, to empower either the Federal Legislature or a Provincial Legislature to legislate with respect to any matter not enumerated either in the Federal or in the Provincial Legislative List.

The most important consequence of the accession of the States will be that they will for the first time become subject to the legislation of a body beyond their control and supervision in regard to matters in respect of which they agree to federate. It is no doubt open to the States

to specify the subjects enumerated in the Federal Legislative list which they accept as matters with respect to which the Federal Legislature may make laws for them. The authority thus delegated to the Federal Legislature will not, however, be exclusive, since the States will be competent to exercise their legislative authority till the Federal Legislature decides to pass legislation on all these subjects. It is of course expressly provided that in the event of a conflict between a Federal law and a State law, the Federal legislation will prevail. To this extent there will no doubt be a definite abridgment of the sovereignty of the Federated States. In this connection, it must also be borne in mind that the precise effect of the surrender of powers has generally proved in actual practice to be far greater than those who delegated the power either contemplated or intended. A great deal must necessarily depend on the judicial interpretation of the scope and extent of such delegation. In actual practice, however, the delegation of this power may not substantially affect the authority of the States inasmuch as the Federal Legislative list contains a large number of subjects in regard to which the States are at present under the obligation to accept the policy of the Government of India by virtue of the so-called Paramountcy powers of the Crown.[1]

It is a common characteristic of most Federal Constitutions that the executive power of the Federal Government is co-extensive with its legislative authority. In the case of the Federation of India this will no doubt be the general rule. S. 8 of the Government of India Act, 1935, provides that the executive authority of the Federation does not extend in any Federated State save to matters with respect to which the Federal Legislature has power to make laws for the State. This is, however, subject to the proviso that the executive authority of a Federated State shall continue to be exercised in that State with

1. For a detailed discussion, see Sen, *The Indian States: Their Status, Rights and Obligations*. London, 1930.

respect to federal matters unless a Federal law has provided to the contrary. This is further subject to the condition that agreements may be made between the Governor-General and the Ruler of a Federated State for the exercise by the Ruler or his officers of functions in relation to the administration of Federal laws. It is, therefore, clear that where such an agreement has been entered into, the State concerned will continue to exercise its authority in regard to the administration of Federal laws to the exclusion of the executive authority of the Federation. The provinces, on the other hand, are not competent to exclude the authority of the Federation by any agreement or otherwise. It should, however, be remembered that in cases where the executive authority of the Federal Government is exercisable in any Federated State, the Ruler of that State is under the obligation to ensure that the executive authority of the State is so exercised as not to impede or prejudice the exercise of the executive authority of the Federation. It is also provided that if it appears to the Governor-General that the Ruler of a Federated State has in any way failed to fulfil this obligation, it shall be competent to the Governor-General to issue such directions to the Ruler as he thinks fit after considering any representations made to him in this behalf. In case of a dispute arising as to whether the executive authority of the Federation is exercisable in a State with respect to any matter or as to the extent to which it is exercisable, the question may be referred to the Federal Court at the instance either of the Federal Government or of the Ruler concerned.

This leads us to the question of the judicial authority of the Indian Federation. There are at present different gradations of jurisdictional power possessed and exercised by the Indian States. There are States whose jurisdictional authority is restricted in respect of offences. For instance, the sanad conferring full criminal jurisdiction on the Maharajah of Panna expressly provides that in respect of capital offences the sentences of death passed by the tribunals of the Panna State shall be subject to

confirmation by the representative of the British Government. There are other States whose judicial authority is restricted in respect of persons. For instance, the jurisdiction over the feudatories of the State of Kolhapur has been expressly reserved to the British Government. There are States whose jurisdictional authority is restricted both in respect of persons and of offences. Nevertheless, the vast majority of the States enjoy and exercise plenary jurisdiction over all persons and in respect of all offences committed within their territories.

The result of the accession of the States will be that they will for the first time come under the control of a judicial tribunal not subordinate to their authority. The Federal Court, which represents the judicial authority of the Federation, will have jurisdiction in regard to the States in two different classes of cases. In the first place, any dispute arising between the Federation and a State, or between a State and a Province, or between one State and another will be subject to the original jurisdiction of the Federal Court. Secondly, under S. 207 of the Government of India Act an appeal shall lie to the Federal Court from a High Court in a Federated State on the ground that a question of law pertaining to the interpretation of the Act or of an Order in Council made under the Act or the extent of the legislative or executive authority of the Federation, or an agreement in relation to the administration of federal laws, has been wrongly decided. It is further provided that an appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated. These provisions clearly constitute an express recognition of the sovereignty of the States. It is also provided that all authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court.

Another important consequence of the accession of the States will be the transformation of the character of the allegiance of their subjects. At present the subjects

of the States owe exclusive obedience to their Rulers when within their territories. On the accession of the States their status will not be altered, but they will at the same time owe obedience within the States to the Federal Constitution and to all Federal laws which have been accepted as such by the Rulers of the States. In other words, their allegiance will be divided under the new Constitution. They will, on the one hand, owe obedience to their Rulers and the laws of their States. On the other hand, they will equally owe obedience to all laws enacted by the Federal Legislature in respect of subjects which have been accepted as federal by the Rulers of their States.

An interesting and important problem pertaining to the accession of the States is the question of the right of secession. It has been contended that this right is an extreme manifestation of sovereignty, and is in consequence diametrically opposed to the fundamental basis of a Federal system. Le Fur, for instance, argues that "a non-sovereign collectivity, province or member of a Federal State, cannot, it is evident, of its own will separate itself from a sovereign State of which it forms part."[1] This view is founded on the American doctrine that a Federation is "an indestructible union of indestructible States." This is no doubt true of the majority of the Federal Constitutions which either expressly or implicitly negative the right of secession of the constituent units. It cannot, however, be legitimately contended that the right of secession is inconsistent with the meaning and significance of Federation. The Soviet Constitution, for instance, expressly confers this right on the component States of the Union. It recognises the sovereignty of each constituent State and its imprescriptible right to separate itself from the Federal union of which it constitutes a part. Malitski asserts that this right of secession is purely a theoretical formula which is incapable of effective exercise.[2] This affirmation is erroneous and is in oppo-

1. Le Fur, *Etat federal et Confederation d'Etats* : Paris, 1896.
2. Malitzki, *Sovetskaia Konstitoutsia* : Kharkov, U. S. S. R., 1925.

sition to facts, since the decision and acts of the Soviet authorities have always conformed to the principle of the secession of the States. It has been argued by Touroubiner that "the right of secession, reserved to the Republics of the Union, is perfectly real. They have enjoyed the right in the past, and they will enjoy it in the future."[1] Another theory which has been advanced to explain this provision of the Soviet Constitution is that although the right of secession of each member-State of the Union is a real and practical factor, the right is in abeyance as long as the constituent units continue to be a part of the Union. It does not take an actual and effective form till a member of the Union decides to exercise it. Whatever view be taken of the right which has been conferred on the members of the Soviet Union, it cannot for a moment be urged that it affects the fundamental basis of the Soviet Federation.

A careful examination of S. 6 of the Government of India Act, 1935, would indicate that this right of secession might arise in favour of the States under certain circumstances. S. 6 expressly provides that amendments of certain provisions of the Federation Act may be made without affecting the validity of the accession of the State. It follows therefore that amendments of other provisions of the Act could not be made without affecting the accession of the States. If such amendments were carried out, the Instruments of Accession of the Federated States may be considered as null and void by the States, and they would be entitled to withdraw from the Federation. This view is confirmed by the following statement made by the Attorney-General in the House of Commons on 23rd May, 1935: "any amendment of a protected provision will give a State the right to reconsider its position, because the Instrument of Accession was made upon a certain basis and an amendment or alteration of a protected provision has changed that basis."

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1. Touroubiner, *Otcherki gosoudarstvennogo oustroistva*, U. S. S. R., Moscow, 1925.

LAKṢMĪDHARA AND THE KṚTYA-KALPATARU

BY

RAO BAHADUR K. V. RANGASWAMI AIYANGAR

In modern treatises on Hindu Law sufficient justice is rarely done to the importance of the great Digest (*Nibandha*) in the evolution of Hindu Social and Legal Institutions.[1] This is largely due to the circumstance that attention has been almost entirely monopolised by the great commentaries (*bhāṣyāḥ*) like those of Viśvarūpa, Vijñāneśvara, and Aparārka on Yājña-valkya, and Medhātithi, Govindarāja and others on Manu. The reputation of the *Mitākṣarā* of Vijñāneśvara has thrown into the shadow that of the digests, which were either anterior to or nearly contemporary with it. It is true that the digests of Śrīkarā and Bhoja, to which the *Mitākṣarā* refers, have long been lost, but enquiry might well have been made for a work like the *Kṛtya-Kalpataru*, which has been quoted with frequency and respect by digests from the middle of the twelfth century onwards. It is noteworthy that even a specialist like J. Jolly, who discussed the value of the digest-literature nearly sixty years ago,[2] failed to do full justice to it. While he contended that "it may be confidently asserted that the supreme Rulers of Indian States in all parts of the Peninsula have always taken an active interest in the composition of Law-Digests and Commentaries, and this fact must needs raise a strong presumption in favour of the practical nature of these works", he conceded that it was "out of the question to compare them in any way to the law-codes of modern Europe". He regarded the Digest as analogous to European treatises which are cited in legal decisions, and as

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1. "They did their work so well that their Commentaries and Digests have, in effect, superseded the Smritis, at any rate in a very large measure". (*Mayne's Hindu Law*, 10th edition, 1938, p. 42.) Even Mr. P. V. Kane lumps the commentaries and digests together in one section *viz.*, 57. pp. 246-247, *History of Dharma-Śāstra*.

2. *History of Hindu Law* (Tagore Law Lectures, 1883) 1885.

merely containing statements of law which their Hindu readers would know how far to apply or not in the actual conditions of the prevalent customary law. Jolly's own references to the digest-literature in his earlier work are to comparatively late digests like those of Hemādri, Dalapati, and Ṭoḍarmal. Lakṣmīdhara's work was unknown to him. If he had had access to it, he would have seen its unique value and cited it as a prominent instance of a digest of law, whose binding authority, on the kingdom for which it was composed, must have been unquestioned, in view of the rank and position of its author and of the royal mandate which was responsible for its composition. Even in 1896, when he wrote his later treatise[1] he had no adequate perception of the importance of this digest though he named it. He was obviously unfamiliar, even in 1928, with the contents of those parts of it which he described in the English version of his *Hindu Law and Custom*[2]. Virtually little was known of Lakṣmīdhara till 1916, when Rai Bahadur Monmohan Chakravarti included a short note on the *Kalpataru* at the end of an article on the contributions to the history of Smṛiti in Bengal and Mithilā[3]. Chakravarti actually handled manuscripts of four sections of the *Kalpataru* preserved in the library of the Royal Asiatic Society of Bengal. It was left to Mr. P. V. Kane to collect the available information on this digest and present it in the light of his own inspection of manuscripts of three sections, namely, *Rājadharmakāṇḍa, Vyavahāra-kāṇḍa* and *Dāna-kāṇḍa*[4]. He had no access to the remaining parts though he was aware that Dr. P. Peterson had noted, as early as 1882, the existence of manuscripts of twelve out of its fourteen sections in the library of His Highness the Mahārāṇa of Udaipur.[5] Peterson's interests and knowledge did not extend to *Dharmaśāstra*. He contented himself with quoting only the first quarters of the invocatory verses prefixed to each of the *kāṇḍas* and their colophons. His unfamiliarity with the *nibandha* literature made him cite the work, in spite of the explicit statement in the colophons, as *Kṛtya-ratnākara*, which is the distinctive title of a section of a similar digest

1. *Recht und Sitte*, Strasburg, 1896.
2. Ed. Bata Krishṇa Ghosh, Calcutta, 1928.
3. J.A.S.B., 1916. pp. 311—375.
4. *History of Dharmaśāstra*, Vol. I. 1930, pp. 315—318.
5. *Report on the Search for MSS. in the Bombay Circle*, 1883, pp. 108—111.

composed by Caṇḍeśvara, in imitation of the *Kalpataru*[1] early in the fourteenth century.

The printing of some of the later *nibandhas*, which have laid the *Kalpataru* under liberal contribution, and the examination of manuscripts of unpublished digests, which have cited the *Kalpataru* freely, now make it possible to understand the reason for the great reputation which it formerly enjoyed, and the extent of its influence. Monmohan Chakravarti showed that the influence of the *Kalpataru* was traceable not only on the later writings of the Bengal and Mithila schools of Hindu Law but over all the chief legal writers in North India and the Dakhan. In Bengal, Aniruddha (c. 1160 A. D.) was the earliest to quote the *Kalpataru* as an authority, and Ballālasena, (c. 1165 A. D.) who was nearly contemporary with Lakṣmīdhara appears to have been influenced by him. Śūlapāṇi (c. 1400 A.D.), Śrinātha (c. 1500 A.D.) and Raghunandana (c. 1490-1570 A.D.) in Bengal, Śrīdatta (c. 1245 A.D.), Caṇḍeśvara (c. 1300-1360 A.D.), Vācaspati Miśra (c. 1450 A.D.) and Rudradhara (c. 1360-1400 A.D.) in Mithila, Harinātha (c. 1350 A.D.), Śrīdhara (c. 1150 A.D.) Viśveśvara Bhaṭṭā, Madanapāla (c. 1360-1390 A.D.) and the *Madanaratna* (c. 1425 A.D.) in North India, Hemādri (c. 1260 A. D.) and Pratāparudra-deva (c. 1497-1539 A. D.) in the Dakhan are among those who made extensive use of Lakṣmīdhara's digest in composing their own works. Along with references to Lakṣmīdhara and his digest in terms of deep veneration, we find in many later works, *e.g.*, those of Hemādri and Caṇḍeśvara, the reproduction *wholesale* of pages after pages of the *Kalpataru*. In fact, owing to this method of appropriation practised by the later digest-writers, almost the whole of certain sections of the *Kalpataru* can now be detected in some later digests. This is prominently the case with the *Vīramitrodaya* of Mitra Miśra[2], the *one* work which, in its range and size, if not in its quality, excels the *Kalpataru*. This curious system of wholesale borrowing was probably deliberate and designed with the purpose of making a later digest supersede an earlier. It might partially account for the almost total disappearance of some of

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1. Printed in 1926 in *Bibliotheca Indica*.

2. Composed between 1610 and 1640 A. D. under the patronage of Bīr Singh of Orchha, the favourite of Jahangir. Twenty-two sections of it are known, and half the number has been printed at Benares, (1906—1939).

the great digests of the earlier epoch[1]. In the later digests the self-conscious manner in which the views of Lakṣmīdhara are quoted would suggest not merely the great value attached to his pronouncements but the merit of citations from a writer whose work had become scarce. It may be noted, as an illustration, that the *Sarasvatī-vilāsa* of Pratāparudra-deva has a whole chapter (paras 627 to 773 in the edition of Foulkes) summarising the views of Lakṣmīdhara on the division of inheritance (*dāyabhāga*)[2]. Not less noteworthy is Pratāparudra's reference to the author of the *Kalpataru* as *Bhagavān* Lakṣmīdhara, giving him the rank of an *ācārya* or sage.

The influence of Lakṣmīdhara did not penetrate to South India. He is not referred to by South Indian digest-writers like Varadarāja, the author of *Vyavahāra-nirṇaya*[3], Devaṇṇa Bhaṭṭa and Mādhavācārya, very probably because they had no access to the *Kalpataru*. The circumstance that Benares, in which Lakṣmīdhara probably lived and wrote, was repeatedly sacked by the Muhammadan invaders within a few years of Lakṣmīdhara's death, and the whole area was thoroughly ravaged[4], will account for the almost total disappearance of manuscripts of *Kṛtya-kalpataru*, and the impossibility of the extension of its doctrines, in the following centuries, to an area so remote as South India.

Before proceeding to describe Lakṣmīdhara's work, a brief reference may be made to the place of the Digest (*Nibandha*) in the evolution of Hindu Law. Our social institutions have, in a correct perspective, to be viewed neither as mere instruments nor as mere ends. While they serve initial and intermediate ends they cannot lead to the ultimate end. They help our

1. "As better and more compact digests came to be composed in later times, the *Kalpataru* fell more and more into obscurity. It is for this reason that Mss. of the work are rare" (Kane, *op. cit.*, p. 318). It *cannot* be said that later digests like the *Ratnākara*, *Madanoddyota* and *Vīramitrodaya* are "better and more compact" than the *Kalpataru*.

2. Paras 627—773 in T. Foulkes, "Hindu Law of Inheritance according to the *Sarasvati-vilāsa*," 1881; and pp. 421—430 in the Mysore edition of *Sarasvati-vilāsa*, 1927.

3. This work is about to be published by me. Varadarāja probably lived before Mādhavācārya.

4. In 1194 Benares was sacked on the defeat and death of Jayacandra, and over a thousand of its temples were destroyed. (Briggs, *Ferishtah*, I, p. 179; Elliot, *History of India*, II, p. 223.)

progress to the goal and furnish the means to the self-discipline without which our advance to the goal *viz.*, *Mokṣa*, will be impossible. In a scheme of an almost endless chain of rebirth (*samsāra*), and in man's advance towards the goal which is to end re-birth, he is helped or retarded by his own actions (*karma*). The eternal (*sanātana*) institutions and ideals of life are designed to help the realisation of this end. The value of incarnating as a human being lies in the opportunity furnished by a *regulated* life to break the chain of *samsāra*. Man is enabled to attain the end not by flying from the world but by living in the family and by his being part and parcel of society. The responsibility for the advance towards the goal lies individually on every human being and collectively on society, as represented by those appointed as the guardians of the eternal social order (*Varṇāśrama-dharma*). The social classes (*varṇāḥ*) are interdependent. So are human aims (*puruṣārthāḥ*). Institutions arise from the desire for well-being (*Artha* and *Kāma*) and they are sustained and directed by duty (*Dharma*) towards emancipation (*Mokṣa*). As a measure of discipline and training, and for the attainment of the goal, life is divided into stages marked by 'resting places' (*Āśramāḥ*). The march from stage to stage is progressive, and the four *āśramas*, like the four *varṇas*, are all of *equal* importance and they are also interdependent. Society, as represented by the King, has a responsibility as well as an interest in the due maintenance of the social order, which is itself part of a scheme which runs behind and beyond the short span of human life. The principles regulating life are embodied in concepts of duty (*Dharma*) ranging from the widest and the most general to the narrowest and personal. The fundamental purpose of education and training is to inculcate the lessons of duty (*Dharma*). The science of duty (*Dharmaśāstra*) is the science of life[1].

From these conceptions sprang a belief in the paramount value of *Dharmaśāstra*. Its principles were taught in the schools, and were taught orally. To fix the teaching in the memory mnemonic devices were adopted. The lessons were strung on a series of aphorisms (*sūtrāṇi*). As the content of *Dharma* is the same for every one, and is immutable, a funda-

1. I developed the ideas in 1934 in my Calcutta University Lectures. Consult a lucid statement of the Hindu view of life and social institutions in chapters I and II of P. H. Valavalkar's *Hindu Social Institutions*, 1939.

mental unity must exist in the teachings of all schools.[1] But, the schools may vary mnemonic devices, and the adjustment of stress on different aspects of *Dharma*, according to the needs of particular persons or occasions. This leads to *apparent* differences of doctrine in the manuals made up of *sūtras* or easily remembered verses composed by different schools. When such differences become numerous or acute, through the multiplication of *Dharma-sūtras*, the need for reconciliation, comprehension and simplification, for the benefit of persons who cannot depend entirely upon oral tradition and memory, leads to the composition of comprehensive works (*saṁhitāḥ*) which collect the teachings of the *sūtras*, add the explanatory matter orally given by teachers, and present them in orderly treatises, like the *Manu-ṣmṛti* or *Manu-ṣaṁhitā*. As social life becomes varied and complex, and oral expositions of the *Saṁhitās* on *Dharma* are found insufficient for the preservation and promulgation of the principles of *Dharma*, commentaries (*bhāṣyāḥ*) on the *Saṁhitas* come to be written. There is always present the hypothesis that *Dharma* is comprehensive, complete, consistent and suited to *all* possible situations and changes in human life. *Apparent* conflict in the works on *Dharmaśāstra* can be resolved by the application of rational principles of interpretation (*Mīmāṁsā*), which will reveal the underlying consistency. Commentators specialize in the resolution of such 'contradictions' and commentaries come to contain not merely verbal explanations but discussions of fundamental principles and their re-enunciation. A great commentator like Asahāya or Medhātithi or Vijñāneśvara selects a well-known *Saṁhitā* on *Dharma* like that of Manu or Yājñavalkya and while professing only to interpret his text he actually proceeds to summarize the teachings on *Dharmaśāstra* in its entirety, and to indulge in elaborate comments in which, by refined and intricate reasoning, reconciliation is sought to be effected between apparently conflicting authorities and the opposition between *Dharma* and recognised usage (*ācāra*). As such commentaries are specially intended for the benefit of the scholar and legist, a simpler

1. "The authors of the Commentaries and Digests assume that the smṛtis constitute a single body of law, one part of which supplements the other, and every part of which, if properly understood, is capable of being reconciled with the others." (*Mayne's Hindu Law*, 10th edition, 1938).

codified form of *Dharma* is needed for the benefit of the less advanced students. The need is met by verse-summaries of *Dharma* (*Dharma-saṃgrahāḥ*) in which along with the principles enunciated, differentiated and reconciled, the names of the sages responsible for specific views are also given[1]. Such a work was composed by Medhātithi and is now lost. To this class belong the versified summaries of the principles of *Dharma* as laid down by the twenty-four (*Catur-viṃśati-mata*) or thirty-six (*Ṣaṭ-triṃśat-mata*) exponents of tradition (*smṛtikārāḥ*)[2].

The elaboration of devices for the conservation and diffusion of *Dharmaśāstra* does not stop even here. The King, as the leader of society, has as his personal responsibility (*Rājadharma*) the obligation *firstly* to understand himself correctly the principles of *Dharma* which should regulate the conduct of every one in the kingdom, and *secondly* to see that those who administer the kingdom, as well as those for whose benefit they administer *Dharma*, have a clear view of their respective duties[3]. The device chosen for realizing this object is the *Nibandha* or the *Digest*[4]. A conscientious king, so educates himself to a mastery of *Dharmaśāstra* that he can himself expound *Dharma* in a commentary or digest. So acted Aparārka, who composed (c. 1125 A.D.) a famous commentary on *Yājñavalkya-Smṛti* and Bhoja Dhāreśvaṛa, who composed a digest a century earlier[5]. Other kings, not so gifted, would commission a learned Minister to compose the digest.[6] The founder of a dynasty, whose rise to supremacy is recent, or whose pretensions to the throne or to *Kṣatriya* lineage are disputable, would try to show his zeal for upholding *Dharma* by arranging for the composition of a digest.[7] An ambitious prince will now and then try to make up for his relative

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1. *Cf.* as a type of the class the now lost *Smṛtisangraha*, which is frequently cited by the *Mitākṣarā*, Aparārka and *Smṛticandrikā* (Kane, pp. 239—242).

2. Kane, *op. cit.*, pp. 223—225 and pp. 237—238.

3. *See* my lectures on *Rājadharma* (Adyār) *passim*.

4. Kane, *op. cit.*, p. 247.

5. Kane, pp. 275-279 (Bhoja) and 323-334 (Aparārka).

6. The *Mitākṣarā*, which is virtually a digest, was obviously commissioned by the Cālukya emperor Vikramāditya VI, as may be seen from its concluding verses.

7. *cf.*, Candradeva of Kanauj or Bukka I of Vijayanagara.

inferiority in the scale of rulers by undertaking the provision of a digest comparable with those undertaken by rulers of the first rank[1]. In the days in which Hindu society appeared to be threatened with dissolution, owing to the onslaught of enemies of alien race and faith, there was a special inducement to the zealous in the Hindu fold, to re-state in new digests the principles of *Dharmaśāstra.* These conclusions follow from even a cursory perusal of the history of *Dharmaśāstra.* The *Nibandhas* of Ballālasena (*Sāgara*) of Caṇḍeśvara (*Ratnākara*), Mādanasiṁha (*Uddyota*), Dalapati (*Nṛsiṁhaprasāda*), Pratāparudra, Mitra Miśra (*Vīramitrodaya*), Anantadeva (*Kaustubha*) and Nīlakaṇṭha (*Mayūkha*) illustrate the dicta. A great ruler of a new dynasty goes further. He gets a great Brahman to function as his Chief Minister, entrusts to him the organisation of a Hindu Literary and Religious Revival as well as the composition of a first-class digest of *Dharmaśāstra.* To this aspiration we owe the monumental digest of Hemādri, composed when he held the office of the Minister under Mahādeva, the Yādava King of Devagiri. Mādhavācārya's *Bhāṣya* on *Parāśarasmṛti,* and Vijñānaeśvara's *Mitākṣarā,* whose concluding verses glorify the Cālukya king Vikramāditya VI. The work of Dalapati and of Akbar's Revenue Minister Ṭoḍarmal (*Saukhya*)[2] reflect the tolerance of Musulman Rulers, who commissioned digests of *Dharmaśāstra* for the benefit of their Hindu subjects.

Among such works, *Kṛtya-Kalpataru* stands pre-eminent. Its author Bhaṭṭa Lakṣmīdhara describes himself as the Chief Minister for Peace and War (*Mahā-sāndhi-vigrahika*) of Mahārajādhirajā Govinda-candra-deva, and as the son of Bhaṭṭa Hṛdayadhara, who had held the same office. In the brief introductory verses prefixed to each of the sections of his digest, he bases his claim to deal with the matters comprised in the section, on his possession of the appropriate qualities, his *adhikāra* for undertaking to write on it. Thus, he claims to have been trained in the austere school of ***brahmacarya*** before he became a householder (*gṛhastha*), and devoted himself to the vedic studies and ritual prescribed for Brahmans. He had

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1. *e.g.* Madanasiṁha, Bhagavanta of Bhareha, Bīrsingh of Orchha, Bāz Bahadur-Candra of Kumaon etc.

2. Kane, pp. 421—423. The seven *Saukhyas* of his digest are collectively known as *Ṭoḍarānanda.*

performed the prescribed daily baths and *yajñas*, and omitted the timely performance of no rite prescribed for a *śrotriya*[1]. With piety, he had propitiated his ancestors (*pitṛgaṇa*) by the due performance of *śrāddhas*. He had 'purified the earth' by the excavation of tanks, the planting of trees, and the foundation of villages given as gifts to learned Brahmans, and otherwise illustrated in his own life the duty to make gifts (*dāna*). The resthouses, which he had constructed on the routes leading to holy places (*tīrtha*) were crowded with the devout pilgrims who had undertaken the toilsome journeys to wash away their sins. By his performance of expiatory rites he had become a luminary of *Dharma*, by whose light the world guided itself. It was owing to *his* wise counsel that King Govindacandra trod the path of righteousness, and attained supremacy over many kings. By his mastery of the different branches of learning, by his eloquence, and by his trained intellect, he had attained the capacity to expound, as a judge, the intricacies of law in such a manner as to win the spontaneous admiration of the learned men who crowded his Court. When, as Chief Minister, he undertook 'the *yajña* (sacrifice) of the protection of the world (*viśva-pālana*),' the virtuous subjects (*sādhavaḥ*) attained prosperity (*puṣṭi*) and calmness of mind (*śānti*). By his own studies in philosophy and *śāstra* he had attained an unmatched capacity to expound them in such a way as to help the good to overcome the darkness of delusion (*māyātamaḥ*) and achieve the happiness of ultimate release from re-birth (*Mokṣa*).

Stripped of poetical imagery, the descriptive verses in which the qualities of the author are described, amount to this. Lakṣmīdhara was by birth a learned *śrotriya* whose family had attained to the dignity of being termed *Bhaṭṭas*. He was born and lived in affluence. The position of Chief Minister, which he came to occupy, had been held previously by his father. Apparently, the Gāhaḍwāla dynasty, to which his

1. Yājñavalkya (I, III) distinguishes between *Srotriya* and *vedapāragaḥ*. The *Mitākṣarā* explains the distinction: One who has *studied* one *Sākhā* of the Veda thoroughly is a *Srotriya*, and one who can *teach* one *Sākhā* is a *vedapāragaḥ*. This follows Bhaudhāyana: 'ekām Śākhām adītya Śrotriyo bhavati." Āpastamba would make the successive mastery of the Vedas one by one the test: dharmeṇa vedānam ca ekaikamadītya Śrotriyo bhavati". Tarkavācaspati, following Bhavabhūti (*Mālatimādhava*, I, 5) makes *ācāra* (ṣadkarmanirato nityam) the test. V.N. Māṇḍlik follows Āpastamba, but misquotes Vijñāneśvara's definition of *vedapāragh* (Trn. of Yājñavalkya, p. 176 n.)

master Govindacandra belonged, acted on the ancient precept that kings should employ only those whose ancestors had shown marked fidelity to the kingdom[1]. The inscriptions of the dynasty show that this principle was followed in other appointments also. For example, a considerable number of copper-plate grants discovered at Kamauli (now in the Lucknow Museum) show that the office of Chief Priest (*Mahāpurohita*) at Benares was hereditary in the family of Dīkṣita Jāgūśarman, to whom most of the grants were made[2]. Either as Chief Minister or previously as Chief Justice, Lakṣmīdhara had proved an efficient administrator. By his prowess he had reduced the King's enemies to beggary[2] and misery.[3] He had made extensive benefactions as ordained by the *śāstras* which he expounded. His claim to many-sided learning is fully borne out by his Digest which not only displays a mastery of *Purāṇa* and *Smṛti*, as pointed by Mr. Kane, but shows that he was a great *Mīmāṁsaka* and was profoundly learned in the *Veda*[4]. The bounds of his knowledge cannot be inferred merely from his quotations. True to the convention that a *Dharma-Nibandha* should rely on no authority which was not śāstraic, Lakṣmīdhara confines his quotations to *śrauta* and *smārta* literature, the great epics (*itihāsa*) and *purāṇa*, and he refers occasionally to the views of previous writers on *Dharma*[5]. Even without his explicit references to *Kumārila* (as *Bhaṭṭapāda*) and Śābarasvāmin, his proficiency in *Purva-Mīmāṁsa*, so necessary for the study, understanding and exposition of *Dharmaśāstra*, is evident throughout his work. His interpretations of philosophical passages from the Upaniṣads and the *Bhagavad-Gītā* as well as the *Vedānta-Sūtra* in the *Mokṣa-kāṇḍa*, show his con-

1. *Sa mantriṇaḥ prakurvīta prājñan maulān sthirān śucīn* (Yājñavalkya, I, 312).

2 *See* the Kamauli plate of Vijayacandra and the Yuvarāja Jayacandra *Samvat*, 1224 (*Epig. Ind.* IV, pp. 118 ft.).

3. *See* this verse introducing the *Brahmacāri-Kāṇḍa*:

Viśrāntāḥ, vimukhāḥ, kṣatendriya-mukhāḥ, kṣmātalpanidrālavo,
Bhikṣāvṛttijuṣastvacā paricitāḥ, kaupīna mātrāmbarāḥ,
Nītāh kālavaśena yasya ripavaḥ tad-brahmacaryam param,
Kāṇḍe sa prathamāśrame prathamataḥ prastauti Lakṣmīdharaḥ.

4. Mr. P.V. Kane's statement that the *Kalpataru* "generally quotes *only* the *Smṛti* writers, the epics and the *purāṇas*" (*op. cit*, p. 317) overlooks his many Vedic citations.

5. Later writers were not so scrupulous. Thus, Nīlakaṇṭha cites Cāṇakya and Kāmandaka in his *Niti-mayūkha*.

versancy with the older commentaries. In the notes, which I am appending to my edition of the *Mokṣa-kāṇḍa*, I am giving passages from the commentaries of Śaṅkara and Rāmānuja, which he perhaps had in mind when he gave his own interpretations of important texts. On only *two* occasions does he cite a lay authority. In the *Śānti-kāṇḍa* he quotes Varāhamihira; and in *Niyatakāla-kāṇḍa* he quotes an unnamed work on astrology (*Jyotiś-śāstra*). Unlike the authors of later digests, who crowd their pages with indiscriminate citations, Lakṣmīdhara displays considerable restraint in quotation, and discriminates between the available authorities, using only those whose authenticity or authority was indisputable. It is noteworthy that among the eighteen major *Purāṇas*, he lays under contribution only twelve, rejecting the other six. The *Purāṇas* he has not quoted are *Viṣṇu-Dharmottara, Bhāgavata, Āgneya, Brahmavaivarta, Kūrma, Nāradīya,* and *Gāruḍa*. These were all known to Al-biruni, who wrote a century before Lakṣmīdhara. The rejection of *Viṣṇu-Dharmottara* (which Hemādri and Mitramiśra freely use) shows that, in his view, it was not an authentic portion of the *Vaiṣṇava-purāṇa*. He quotes extensively from five *Upa-purāṇas* namely the *Nṛsimha, Āditya, Devī, Kālikā* and *Nandī*. No copy of the last named *upa-purāṇa* is now traceable. The published *Saura-purāṇa* does not contain any of the passages cited by Laksmīdhara from the *Āditya-Purāṇa*. The two must be different. It may be noted that the *Matsya-Purāṇa* (53,60) mentions only four *upa-purāṇas* namely the *Nārasiṁha, Nandi, Sāmba* and *Āditya*. The *Kūrma-purāṇa* gives a list of *upa-purāṇas*, which omits the *purāṇas* named after Nandi and Devī (I, 1, 17-20). The citation of *upa-purāṇas* side by side with *mahā-purāṇas, as equally* valid authorities shows that in Lakṣmīdhara's view, or in his day, the former were not regarded as in any way inferior to the latter.[1]

Certain ancient *smṛti* writers, whose works are now lost, are referred to by Lakṣmīdhara. They are Bhāguri, Bhartṛ-

1. Ballāla-sena (c. 1069 A.D.) was almost as critical in his citation of Purāṇic literature. *Devīpurāṇa*, which he rejects as unorthodox, is much relied on by the *Kalpataru* which cites it as an authority. See the extracts from *Dānasāgara* on pp. 337-343 of my edition of the *Dānakāṇḍa* of the *Kalpataru*. The equal validity of the two classes of Purāṇas is the thesis of Dr. R. C. Hazra (*Annals of the Bhandharkar Oriental Research Institute*, 1940, pp. 38—62.)

yajña (who is quoted by the earlier Medhātithi), Jayasvāmī (who is once mentioned by Raghunandana), Mādhavasvāmī, and an unknown writer named Utathyatanaya.[1] When these writers are cited by writers later than Lakṣmīdhara, they clearly do so without a personal knowledge of the authors quoted, and appear to borrow the references second-hand from the *Kalpataru*. Lakṣmīdhara naturally respects the authority of Medhātithi, who is quoted in three *kāṇḍas*, as well as of Viśvarūpa, the earliest extant commentator on Yājñavalkya. He knows a Hārīta-Bhāṣyakāra, from whom Hemādri has quoted a passage, to which Mr. Kane has drawn aattention, but it occurs in the *Srāddha Kāṇḍa* of the *Kalpataru*, from which Hemādri obviously took it without acknowledgment.[2] His scrupulous honesty compels him to refer to the views of six earlier *Nibhandas*, which are now totally lost to us: *Mahārṇava*, *Prakāśa*, *Pārijāta*, *Kāmadhenu*, *Mālā* and a work of Halāyudha. who appears to be different from the author of *Brāhmaṇa-sarvasva*[3].

Govindacandra's inscriptions run for nearly half a century from 1104 A.D. to 1154 A.D.[4] His grand-father Candradeva, who is said to have conquered Kanauj[5], and who is described as "the protector of holy places of Kāśī, Kuśika, Uttarakosala, and the city of Indra", claims to have been an ardent and generous patron of Brahmans. Numerous land grants are to his credit. In one case, a grant of his grand-father is to 500 Brahmans[6]. Madanapāla, (c. 1090 A.D.) the son and successor of Candradeva and the father of Govindacandra, does not appear to have taken any active part in the government of his kingdom. His grants are made in his name either by his son Govindacandra as Yuvarāja or by one of his queens. Such a grant, made in 1105 A.D, states explicitly that it was sanctioned by Govindacandra's mother.[7] She was probably Regent, and it

1. *Smṛticandrikā* cites a Utathya as the author of a *Smṛti*. For *four* of the above writers *See* Kane, *passim*. Manu mentions a Utathyatanaya, (III., 16).

2. Kane, *op. cit.*, p. 71.

3. Kane, *op. cit.*, pp. 293—301 and 306—309.

4. R. S. Tripāṭhi, *History of Kanauj*, 1937, pp. 386—7, and *Catalogue of Inscriptions in the Lucknow Museum*, 1915, pp. 10—29.

5. *Ind. Ant.*, *XVIII*, p. 18.

6. Lucknow *Catalogue*, *op. cit.*. p. 9 and *Epig. Ind.* *XIV*, p. 192 (*Candrāvati* plates of Candradeva, 1096 A.D.

7. Lucknow *Catalogue*, p. 10, and Tripāṭhi, *op. cit.*, p. 305.

is not unlikely that Madanapāla was a prisoner at that time in the hands of the Musulmans. An inscription of Govindacandra (1109 A.D.) states that he inflicted repeated defeats on the Muhammadan Amīr (Hāmmīra).[1] The Sarnāth inscription states that he was Viṣṇu Himself incarnated to protect Benares from the wicked *Turuṣka*[2]. The references in these inscriptions are apparently to the expedition which King Māsud III of Ghāzni (1098-1115 A.D) sent against "the capital of Hind, the Kāāba of the Shamins and Kibla of the Infidels". The ruler of Kanauj is stated by the Muhammadan historian to have suffered serious reverses, and to have been "compelled to ransom his person by a large sum of money"[3]. Govindacandra turned the tables against the Muhammadans and drove them beyond the confines of the kingdom of Kanauj. He appears to have extended his dominions into Magadha and to have fought a successful campaign against the ruler of Daśārṇa. The Gāgāha plate claims that he (1142 A.D.) captured the elephants of nine kings and made himself the leading monarch in Jambu-dvīpa.[4] According to the *Rājataraṅgiṇī* (VIII, 245) he entered into friendship with Jayasiṁha of Kāṣmīr (1128-1149 A.D.) and deputed a scholar named Suhaḷa to attend a *pariṣad* convened by the Kāṣmirian Minister Alaṅkāra (*Śrīkaṇṭhacaritā*, XXV, 102). Govindacandra entered into diplomatic relations with Siddharāja-Jayasimha of Gujarat[5] and with his powerful contemporary Kulottunga-Cola, (1070-1120 A.D.)[6]. These alliances would suggest some tension of feeling between Govindacandra and Vikramāditya VI (1076 A.D. 1125 A.D.) the powerful ruler of the Dakhan. The opening verses

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1. *Ind. Ant.* *XVIII*, pp. 16—18. It does not mention its approval by any one else.

2. *Epig. Ind.*, *IX*, pp. 324—27. Vārāṇasim bhuvana-rakṣaṇa-dakṣa eko duṣṭāt-Turuṣka-subhaṭad-avitum Hareṇa, ukto Hariḥ sa punaratra babhūva tasmād Govindacandra iti pratitābhidhānaḥ.

3. Tripāṭhi, *op. cit.*, p. 318.

4. *Epig. Ind*, *XIII*, p. 218. The same claim is made in earlier grants e.g. Maner copper-plate of 1125-26 A.D., J.B.O.R.S., 1916, pp. 441-447.

5. *Prabandha-cintāmaṇi*, *III*, 121. Jayasimha reigned from c. 1093 to 1143 A.D.

6. An incomplete Gāhaḍwāla inscription, dated in the 41st year of Kulottuṅga, gives the Kanauj *praśasti* "The increased emphasis on Sun-worship in the Cola country in Kulottuṅga's reign may be due to the close association with the Gāhaḍwālas, who were great worshippers of the Sun." (K. A. Nīlakantha Sāstri, *Colas*, II, 1937, p. 40).

of the *Kalpataru* allude to the victorious campaign of Govindacandra against the Muhammadans. A śloka introducing the *Rājadharma-kāṇḍa* justifies Lakṣmīdhara's title to expound Rājadharma by pointedly claiming that Govindacandra's benevolent rule and conquests of many kings were entirely due to the merit of his advice as Minister (*Tat-sarvaṃ khalu yasya mantra-mahimāścrryam sa Lakṣmīdharaḥ*). In the introductory verses of the *Kalpataru*, Lakṣmidhara claims that he made his King rule over 'the Sea-girt earth' (*prithvim sādhayataḥ samudravasanām*) and that by his resolute fighting myriads of his King's enemies were destroyed. Such declarations, in a work written by the command of a powerful ruler like Govindacandra and certain to be perused by him, could not have been made by even a favourite Minister unless his services were of such an outstanding character that a public recital of them before the reigning king was allowable. The value of the restrained statements of his accomplishments and services, which Lakṣmīdhara makes in the very brief introductions to the different parts of his Digest, consists in showing that he was not only a great and devout scholar of massive learning and subtle intellect, but that he was also a soldier, administrator and diplomatist, born and bred in an atmosphere of public affairs. In this respect, he should be ranked higher than even a great jurist like Vijñāneśvara, and only with scholar-statesmen like Mādhāvācharya or Caṇḍeśvara, or Cāṇakya.

The reference in the *Kalpataru* to Govindacandra's victories over the Muhammadans occurs at the *beginning* of the *first Kāṇḍa*, while the allusion to his diplomatic successes and wise counsel to his king occurs at the beginning of the *eleventh* section of the Digest. It is therefore, tempting to surmise that Lakṣmīdhara, as befits the son of a Prime Minister, was the trusted companion and friend of Govindacandra, when he was Yuvarāja in the life-time of his father Madanapāla, and that the appointment of Lakṣmīdhara both as Prime Minister and as the scholar deputed for the composition of a digest of *Dharma*, which might fitly usher in the glorious reign of an ambitious and pious ruler, who had already displayed the qualities of a successful soldier and skilled administrator in the troubled reign of his father, synchronized with the *accession* of Govindacandra. That the precepts which Lakṣmīdhara put into the *Kalpataru* were actually followed is evident from the inscrip-

tions of Govindacandra as well as those of his two immediate predecessors and successors[1].

The Gāhaḍwālas sprang into eminence suddenly. They were so to speak *parvenus*[2]. A ruler of an old and well-established dynasty does not feel the urge, which one of a new dynasty does, to commemorate his entry into the ranks of powerful monarchs by some notable action that would capture contemporary imagination and leave a permanent impress of his reign on history. Temples or monuments of brick or stone however nobly planned, cannot outlast a great contribution to letters or thought. It was in this belief that Govindacandra must have planned the compilation of a great digest of *Dharma*, at a time when there was a danger of its perishing, along with the Hindu kingdoms, before the onslaught of a ruthless and powerful enemy of an alien race and faith. It was in the same spirit that Bukka I of the newly founded kingdom of Vijayanagara ordered (*ādiśat*) Mādhavācārya to explain the meaning of the Veda (*Vedārthasya-prakāśane*) and to compose for the guidance of himself and his successors a monumental commentary on *Parāśara-Smṛti*, the *Dharma-śāstra* specially recommended for the Iron Age (*Kali-Yuga*). The addition of an elaborate treatise on *Vyavahāra* to this commentary by Mādhavācārya, and his tacking it to the brief statement in the *Smṛti* that 'the king should protect his subjects and his kingdom through *Dharma*' (*Kṣattriyastu prajā rakṣan kṣitim dharmeṇa pālayet*) is in harmony with the hypothesis that the statements in a *Smṛti* require to be supplemented and elucidated by traditional interpretations, so as to make good the many apparent omissions or gaps.

Among digests, the *Kalpataru* occupies a unique position. Its author was a scholar-statesman. He was a critical and conscientious compiler, discriminating between his sources and scrupulous about the purity of his texts. The high reputation which the *Kalpataru* commanded in later times for its scholarship as well as its critical acumen may be illustrated. Thus, in discussing the value of his authorities, Mitra Miśra (*Vīramitrodoya*, *Paribhāṣā-prākāśa*) justifies his recognition of a

1. Tripāṭhi, *op. cit.*, pp. 337—359.

2. "The Gāhaḍvālas emerge into the light of history so suddenly that it is difficult to clear away the obscurity hanging over their origin." (Tripāṭhi *op. cit.*, p. 296.)

Smṛtisaṅgraha on the ground that it had been accepted (*parigṛhītam*) by the *Kalpataru*. It is curious that the work in question does not appear to be quoted anywhere in the *Kalpataru*. That, however, is immaterial for the argument; it was sufficient for Hindu legists to be told that the *Kalpataru* had admitted the authority. Such a declaration shut the mouth of possible objectors. Any reading accepted by Lakṣmīdhara, even if opposed to the texts available to later commentators and digest-makers, was never rejected. It was either accepted or explained away. Lakṣmīdhara's skill lay in selecting the necessary texts and stringing them together. He interpolates a rare comment or interpretation. So much value was attached to his selective capacity and his occasional elucidation of a word or a passage here and there, that later writers invariably reproduced his citations as well as his annotations without altering a syllable. Finality was held to attach to whatever he had written.[1]

In *two* other respects also the *Kalpataru* is unique. Firstly, it is distinguished by having been written in accordance with a well-conceived and logical plan. A digest must be true to the underlying principles of Hindu life. A cursory reading of even a comprehensive *smṛti* like that of Manu or Yājñavalkya will fail to disclose the background of Hindu life. Lakṣmīdhara so planned his *Nibandha* that it followed the natural sequence of life, in its different stages and activities, as laid down in the *Śāstras*. To a Hindu, life commences with conception and marches through the prescribed four stages or *āśramas* to the final release (*Mokṣa*), which crowns a life properly lived. The *Kalpataru* is accordingly divided into *fourteen* books or *kāṇḍas*, and each book is divided into chapters or *parvas*. At the beginning of each book, Lakṣmīdhara recites the headings of the chapters as a declaration (*prātijñā*) of what he intends to set down in that book. Each book follows its predecessor in a natural sequence which will be apparent even in a mere enumeration. They are grouped and were probably written in the following order:—

1. This is his own claim:

Ekārtheṣvekamekam, kvacit aparamapi-svīkṛtam, kāryayogāt,
Nyastam-vijñānamūlam, pracaratapi tyaktam-ajñānamūlam;
Siṣṭaiḥ samyag-gṛhītam vacanam-abhihitam, spaṣṭitam-ca asphuṭārtham;
Yatrāparo virodhaḥ sphurati viracitā tena tatra vyavasthā.

1. *Brahmacāri-kāṇḍa* commences with *Paribhāṣā* (definitions) and traces the duties of a boy up to the end of *Brahmacarya.*

2. *Gṛhastha-kāṇḍa* the duties of the householder, including the rites of marriage which precede the entry into the *Gṛhasthāśrama.*

3. *Naiyata-kāla or Āhnikā-kāṇḍa* on the daily ritual to be followed by a house-holder.

4. *Śrāddha-kāṇḍa* on the ceremonies to be done for propitiating ancestors (*pitṛs*).

5. *Dāna-Kaṇḍa* on the religious gifts the making of which is an obligatton laid on *gṛhasthas.*

6. *Pratiṣṭhā-kāṇḍa* on the consecration of idols etc.

7. [1]*Pūjā-kaṇḍa,* dealing with the ritual of worship.

8. *Tīrtha-kāṇḍa* on pilgrimages to sacred places.

9. *Vrata-kāṇḍa* dealing with the performances of the periodical *vratas.*[2]

10. *Śuddhi-kāṇḍa* on purification.

11. *Rājadharma-kaṇḍa* dealing with the specific obligations of princes.

12. *Vyavahāra-kāṇḍa* on Civil law and procedure.

13. *Śānti-kāṇḍa* on the propitiatory rites.

14. *Mokṣa-kāṇḍa* dealing with the steps necessary for salvation.[3]

Of the three debts (*ṛṇatraya*) with which man is born and which he has to discharge in this life, the means of discharging the first, the debt to seers, are set out in the first *kāṇḍa*, dealing with *brahmacarya*, that of discharging the second (*pitṛṛṇam*), the debt to ancestors in the second, third and fourth *kāṇḍas.*

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1. The subject of this section of which no Ms. had been known till I discovered one in 1939 in the Bhonsle Raj Library at Nagpur was correctly surmised by M. M. Chakravarti (J.B. A.S., 1916, p. 359).

2. M. M. Chakravarti *op. cit.*, p. 359 wrote: "In the *Malamāsa* and *Prāyaścitta tattvas*, Raghunandana quotes a *Prāyaścitta-kāṇḍa-kalpataru*, That Lakṣmīdhara wrote on *Prāyaścitta* is clear from the *Prāyaścitta-viveka* of Śūlapāṇi". But, I dicovered *vrata-kāṇḍa* at Nagpur, which fills the gap. The Asiatic Society in Calcutta has a fragment of a *Prāyaścitta-Kalpataru.*

3. Only one other digest, viz., the *Vīramitrodaya* dealt with *Mokṣa.*

dealing with *gṛhastha-dharma*, *āhnika* and *Śrāddha*, and the third, the debt to the Gods, (*devarṇam*) by the fifth, sixth, seventh, eighth and ninth *kāṇḍas* dealing with gifts, dedication, worship, pilgrimages vows, as 'means of grace' to attain the mental peace (*Śānti*), which is preliminary to the final release (*Mokṣa*), and which form the subjects of the tenth and fourteenth *kāṇḍas*. The eleventh and twelfth *kāṇḍas* deal with the civil environment in which a man has to live and function, and its attunement to the needs of the progress to ultimate beatitude.

No other digest has essayed so logical and so comprehensive a presentation of the revealed laws of life. When finished, the *Kalpataru* must have provided a complete and authoritative survey of Hindu *Dharma* made for the benefit of posterity. It is tragic that so noble a work should have almost perished in the calamities attending the early Muhammadan conquests.

The comprehensive range outlined for it, has made the complete *Kalpataru* a work of great volume, in spite of the obvious attempts by Lakṣmīdhara at brevity. He not only eschewed unnecessary comment, but in sections dealing with religious rites, he contented himself with a bare indication of the *mantras* to be used and the rituals to be followed, without giving in full the *prayoga* for the benefit of the officiating priests (*purohita*). The underlying assumption in the *Kalpataru* is that it will be used only by trained scholars, who could be trusted to understand it without commentary, and who would be able to act upon the briefest hints for selecting the appropriate *mantras* or *prayoga*. The cumbersome growth of later digests, dealing with matters already dealt with by the *Kalpataru*, is largely due to the addition of material, which Lakṣmīdhara was content to leave to the priest with mere indications.[1] When learning and priest came to be divorced, works on *prayoga* became necessary, and the cumbersome digests of Hemādri, Madanasiṁha and Mitra Miśra came to be preferred to the more restrained *Kalpataru*. Even with these self-imposed restrictions, Lakṣmīdhara's work attained a size, which makes it stand only second to the

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1. The *Dānasāgara*, which King Ballālasena composed 'with the help of Aniruddha-bhaṭṭa in 1169 A.D., in the generation following Lakṣmīdhara's, quoted *in extenso* all the *mantras* to be used in making gifts, while the *Kalpataru* merely names them.

Viramitrodaya in bulk[1]. Its *vyavahāra-kāṇḍa* is among the larger treatises on the subject. But, in studying it, as in studying any other part of the *Kalpataru*, the underlying unity of the entire work must be borne in mind, and for explanations of matter, which may be wanting in one part we must learn to turn to another. The *Kalpataru* like every *Dharma-saṁhitā*, was designed to be studied as a whole, and not in separate self-contained sections[2].

It is not possible, in the compass of an article, to describe the specific doctrines of Lakṣmīdhara, especially when the whole work has still to be reclaimed and published. The textual difficulties in the way of editing it virtually compel the study of almost the whole range of the vast subsequent literature of *Dharmaśāstra*[3]. But, the task must be undertaken and accomplished in order that so memorable a work,—the source of many subsequent digests—might be made available to the historian and to students of Hindu social and legal institutions[4]. When published, the *Kṛtya-Kalpataru* will also provide ample

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1. Its *fourteen* volumes contain about thirty-thousand *granthas*, i.e. about one-third the size of the *Mahābhārata*. The *Viramitrodaya* is in twenty-two parts.

2. The distortion of Hindu Law by modern lawyers and judges is due to their viewing *vyavahāra* apart from other sections of *Dharma-Sāstra* and an unwarranted distrust of the *mīmāṁsā* rules of interpretation. *Cf.* *Mayne's Hindu Law*, 10th edition, pp. 41-42.

3. The library of H.H the Maharana of Udaipur contains a set of the *Kalpataru* in which the seventh and ninth parts are wanting. Fragments of the *Kalpataru* have been found in some libraries, but for certain *kāṇḍas* like the first, seventh, the ninth and the thirteenth, we have now to depend upon solitary, defective and incorrect manuscripts. In preparing my edition of the *Kalpataru*, I have tried to secure every known manuscript of any portion of it and have found that some which had been in existence sixty years ago are now lost beyond recovery. The editing of a work of such importance from one or two manuscripts is very difficult. Help has, however, come from an unexpected quarter. The thoroughness with which whole passages from the *Kalpataru* have been appropriated by later authors like Hemādri, Caṇḍeśvara and Mitra-Miśra makes it possible to fill up gaps in our text or clear up obscurities caused by copyists. Nevertheless the task is formidable.

4. How little is known of the value of the *Kalpataru* will be evident from only *four* lines being given to it in the latest and fullest presentation of Hindu Law by a great lawyer: e.g. S. Srinivasa Iyengar's edn. of Mayne's *Hindu Law*, p. 54. J. C. Ghose reprinted the *Dāyabhāga* section of the *Vyavahāra-kāṇḍa* of the *Kalpataru* in II, pp. 483—502 of his *Principles of Hindu Law*, (1917) from a manuscript in the library of the Asiatic Society at Calcutta.

material to those who endeavour to reconstruct either the lost codes, whose number is 'legion', or the authentic text of Purāṇas and Epics, which have come to us in forms so different from those in use, when they were laid under contribution by great lawyers and scholiasts, like the forgotten Minister of the last independent Hindu Emperor of North India.

THE ART OF LAW-MAKING

BY

S. SATYAMURTHY

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I consider it a great compliment that I should have been asked to contribute an article to the 'Golden Jubilee Number' of the 'Madras Law Journal.' Though my connection with the Bar has been more or less nominal for many years, I am proud of that connection and deeply grateful for the legal training. I have been a regular subscriber of the Madras Law Journal for the last 27 years. Now I should like to pay my tribute of admiration for the splendid work of the 'Madras Law Journal' in the interests of the advancement of sound law.

I am however familiar to some extent with the art of law making, having taken part in that process more or less continuously for a period of 17 years now from 1923, when I entered the Madras Legislative Council. During my time in Madras, Delhi and Simla, I have taken part as a Member of the Assembly, and as a Member of several Select Committees in the shaping of many important pieces of legislation in this country. I therefore claim to know this art from the inside. I propose to give very briefly in this article my impressions.

It may be a depressing conclusion, and on the whole uncomplimentary to the average legislator or law-maker, who is a member of the modern legislature but I must state the truth. Sir Frederick Pollock lays down several qualifications for the law-giver. In the first place, Sir Frederick Pollock says, "he must know accurately the existing law and he must be clearly aware of the deficiencies

in that law and have a clear conception of the changes he wants to produce and he must also have the skill to express that intention in apt, sufficient and unambiguous terms which shall make his purpose plainly understood, if possible by those who have to obey law but in any case by those who have to administer it." This is a very impressive list of qualifications, and I must express my assent with that distinguished jurist's statement that Parliamentary legislation is carried on, with rare exceptions, under circumstances and in a manner which effectively prevent most or all of these conditions being satisfied.

What is the remedy? One obvious remedy is that the legislatures, as they are composed to-day and as they are likely to be composed in the future, at any rate as far as we can envisage, being incompetent to enact legislation scientifically themselves, should lay down merely the principles of legislation in as accurate a language as they can command and leave it to experts and draftsmen to put them up in a codified form. But, even under these circumstances, the average legislator must know the existing law, must know relevant facts, must know exactly what he means to do, and be able to express in the form of simple propositions, his meaning clearly. I, therefore, suggest that although it may seem undemocratic, it may be worth while to consider whether, in the case of members of legislatures, a minimum educational qualification may not be prescribed.

But, apart from ordinary legislation, one special simple form of legislation or law-making presents several difficulties, namely, consolidation bills; for one thing it is very difficult to get them through a legislature.

Nobody is enthusiastic about consolidating legislation and no Minister expects to obtain credit from passing a measure of consolidation. Such measures are not greatly demanded by the constituencies and do not figure as items in any political programme. Hence the Minister is naturally unwilling to introduce any consolidation measure except on an assurance that it will be passed unopposed

and such an assurance cannot always be obtained. Last but not least such a measure is difficult to discuss. Yet lawyers, judges and even ordinary citizens always welcome consolidating pieces of legislation. These at least must be largely draftsmen's work, and legislators can do hardly anything in this direction, without the aid of experts at every stage.

I have referred to the need for experts' help for legislators in drafting and passing legislation. In England they have such an office. The Parliamentary Counsel and his assistants form this office. Usually when a Minister wants a particular Bill to be prepared he causes the accompanying letter to be written to the Parliamentary Counsel.

Treasury Chambers.

Sir,

I am directed by the Lords Commissioners of His Majesty's Treasury to transmit to you herewith a copy of a letter from the (Home Office) dated containing instructions for the preparation of a Bill to and I am to request that you will place yourself in communication with the (Home Office) with a view to drawing the same.

I am,
Sir,
Your obedient servant,
A. B.

The Parliamentary Counsel.

Then there is a conference with the Minister in Charge of the Bill or with the permanent head of his Department or both. The draftsmen then prepare a memorandum stating the existing law, present the history of previous legislation on the subject, or raise questions of principle to be settled. This draft is discussed with the Minister and undergoes many changes and the Parliamentary Counsel has got the responsibility to see that Government Bills are not brought up which bring him into conflict

with different Government Departments. When the draft has been more or less finally settled, the Bill is circulated to all the members of the Cabinet.

But, of course, while the draftsman's work is very important and may even be described as the foundation of legislation, he is the only one of the experts whom the Minister has to consult. There is a danger of government by experts. But there is also a danger of government by amateurish people. But, government by experts is one thing, government with the aid of experts is another.

There are drafting departments both in the Government of India and, I believe, in the Madras Government; but I am convinced from my personal knowledge and experience that these departments stand in great need of eminent, well-read and sound lawyers. Indian legislation is progressing at a rapid pace and recent judgments of High Courts and of the Federal Court, a few as the latter are, have brought to light the need for the increasing aid of real experts in drafting legislation; and legislation, as in other branches of government equally, with the aid of experts is desirable and wise.

But what has worried me considerably throughout my work as a Member of one Indian Legislature or other is the way in which a Bill is dealt with by the Legislature after introduction. The formal motion for leave to introduce the Bill is by a convention rarely if ever opposed. The next motion is that the bill be taken into consideration, if it is a simple one; or be referred to the Select Committee, if it is a complex one. At that stage, speeches are made usually on the general principles of the Bill. Very little, attention if any, is paid to the drafting of the Bill or inconsistencies of any wording or ambiguity therein, and then the Bill is referred to a Select Committee. It often consists only of very few lawyers or even of men who take the trouble to study the Bill and the literature appertaining thereto. But the convention in the Government of India is that the Law Member is the *ex officio* Chairman of these Select Committees. It is not so in Madras. I wish a

similar convention is established in all the Provincial Governments.

The work in these Select Committees is attended to in Madras by the Secretary of the Legislature, and in the Government of India by the Secretary of the Department concerned. I prefer the Madras practice to the Government of India practice. Moreover, I desire that at the meetings of the Select Committees the draftsmen should be present as they are usually in Select Committees on the Government of India Bills, and I believe also in Madras.

The greatest trouble in the Select Committee and later in the Legislature is when amendments are moved. It is easy enough to discuss the merits of the amendments, and to vote for or against them. If they are voted against, the trouble ends there; but when the amendments are passed by the Select Committees or by the Legislature, then the trouble starts. I am sure your readers will agree with me that the effect of incorporating an amendment or amendments in the clause of a Bill is never seen in its full meaning and in its true perspective until the amendments are actually printed and the clauses as amended are also printed and then and then alone the careful reader may be able to understand the full significance of the amendments after reading the amended clause and comparing it with the original clause more than once. Unfortunately, from my experience this work is perfunctorily done in the Select Committee, and very rarely, if ever done, in the Legislature in the open House.

For remedying these defects, I suggest that so far as the Select Committee stage is concerned the meetings should not be held day after day continuously at any rate when substantial amendments have been accepted, but there should be an interval during which the clauses as amended should be printed in parallel columns with the original clauses, and Members of the Select Committee should be given reasonable time to compare and digest the full meaning of the amendments. This may take some

more time, but in my opinion it may be well worth-while.

But at the end of the Select Committee stage the Committee should adjourn, in the case of important Bills for a whole week, and the whole Bill, as amended by various amendments accepted by the Select Committee, should be printed and copies circulated to all Members and they should have at least three or four days to read the Bill carefully and give their reactions to the Select Committee at the next meeting.

It is also the duty of the draftsman to do the following things. When a Bill is amended in a Committee, it requires minute examination after the Committee stage for the purpose of seeing whether there are any errors to be corrected, inconsistencies to be removed or consequential alterations to be made, and amendments may have to be framed for insertion at a later stage.

No doubt considerations of time and money are in favour of Select Committees alone but at any rate in the case of some important Bills I prefer the well-known Parliamentary procedure of Committees of the whole House.

In England the institution of the Parliamentary Counsel's office has led to great improvement in the form of legislation. " The language of statutes has become more concise, uniform and accurate and the arrangement of statutes has become more logical and uninconsistent."

India has to make a great progress in that direction yet. One fashionable way of legislation now-a-days is to put in the minimum clauses in a bill and to leave to rule-making power very many important points, *i.e.*, the power to be exercised by the executive. There has been a great deal of criticism against this delegated legislation. A compromise is possible in this matter. It is impossible, considering the complexity of modern legislation and modern life and considering the limited amount of time available to Parliament, to legislate in one single piece of

legislation all matters. It is therefore wise to have the power and to use it to delegate certain powers of legislation to the executive. But at the same time there should be some convention by which these rules, when made, should come under Parliamentary scrutiny in one form or another.

There is a great deal to be said, from one point of view that, as far as possible, judge-made law should be superseded by comprehensive codes which are self-contained and self-explanatory. The Code Napoleon has not achieved all that it attempted to achieve, but sometimes I wonder whether a Civil Code for the whole of India may not bring about the unity of India sooner than many other remedies.

The fact remains that, " in all contemporary democratic countries now, few as they are, every important law has to be submitted to the scrutiny and criticism of popular Assemblies, created for that purpose, and is liable to amendment and rejection by that Assembly ; and therefore one of the most difficult of the problems of modern legislation is how to reconcile the right of criticism and amendments which is properly claimed by a popular Legislative Assembly with the precision of language, the elegance and symmetrical form which are the characteristics of good law." It is not always easy to solve these problems. It must never be forgotten that modern law depends for its sanctions on the popular will; and therefore we should, while aiming at precision of language and consistency and logic, should also aim at making such laws, which adapt the political, administrative and economic arrangements of the country to the requirements of the times. That is the only way to avert revolution. As I said before, we must try to improve the form of our legislation by training good draftsmen and using them increasingly, and there must be more time given in modern legislatures for discussing and voting on first-class legislation and the average citizen must admit that the average legislator must be a full-time trained man and must be

paid for his difficult work. Then and then alone, can we get proper laws.

I have quoted more than once in this article from Sir Courtenay Ilbert's Book on "The Mechanics of Law-Making." I will conclude this article with one apt quotation. "Great civilized nations of the world (who are they ?) are all busily engaged under different conditions and by different methods in pursuing objects which are similar and often identical. We are all attempting with imperfect vision and with stumbling steps to advance so far as it can be advanced by legislation and administration the cause of humanity and civilization, to make our laws more intelligible and more rational, to make better provision for those who are unable to help themselves." These are great objects and while it is the job of statesmen and of leaders of men to achieve these objects, and to lay down the lines on which these objects should be achieved, the art of law-making as it is, *i.e.*, the mere drafting of laws is equally important and a difficult job. And, although statesmen and ministers will make up their minds as to the objects and means to attain those objects, unless laws are made by competent and wise men with the aid of real experts, the objects may not be gained or only imperfectly achieved or in extreme cases defeated altogether. Hence the necessity for constant attention to the art of law-making.

THE CONTRIBUTION OF HINDU LAW TO WORLD JURISPRUDENCE

BY

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WIDESPREAD IGNORANCE REGARDING THE CONTRIBUTION :—Many people, even in India, are not aware that the Hindus had made as great an advance in Jurisprudence and practical administration of Law as they had in religion, philosophy, and other Arts and Sciences. That is, of course, because, unlike the Vedanta doctrine in Philosophy, and Vaishnavism and Saivism in worship, Hindu legal theories have not been free from successful attack, and even radical change, by foreign ideas. Indeed, they have been subject to them to such an extent that it may be said that the modern Hindu Law is only Anglo-Muslim-Hindu Law, having been radically altered in constitution, shape and outlook, and even essential features, by centuries of Muslim and British rule and by the rulings of Judges owing allegiance to other systems of Jurisprudence, and, in many cases, unacquainted with the basic Hindu ideals in law. It must be obvious, however, to any thinking man that the Hindus, who had contributed so richly in other realms of thought, Science and Arts, could not but have given equally richly in Jurisprudence and Law.

WHAT ARE THE CONTRIBUTIONS ?—The Hindus gave the world of Mathematics the numerals and zero, without which the present progress would have been impossible ; to cultivation, rice, ginger, sugar, cocoanuts and plantains, without which any enumeration of edible crops

would be incomplete ; to games, chess and polo ; to the military art, elephants, the tanks of olden days ; to the fauna of the world, cows and hens ; to the realm of flowers, lotuses ; and to connoisseurs of precious stones, the most famous diamonds and sapphires. Let us examine, in brief, on this occasion of the Golden Jubilee of the leading Law Journal of the most Hindu Province in India, the contribution of Hindu Law to World Jurisprudence, in various directions. Of course, since all men have much the same bodily, mental and moral make-ups, what is claimed here as contributions by Hindu Law may also be found in some other systems of law, notably Roman Law and English Law, in parts or in different combinations.

THEORY OF JURISPRUDENCE.—First of all, let us take the theory of the Hindus regarding law. Unlike in western countries, law was not considered to be merely a thing intended for ensuring order, peace and prosperity in this world. *Nyaya*, or worldly law, was intended to promote *Dharma* or righteousness, which, in turn, was intended to secure *Moksha*, or freedom from the personal ends of egotistic men, which, in turn, led to absorption in *Brahman* or God. So, the chief end of law was to realize the ideal of righteousness, in other words, *Lokasangraha*, or the welfare of the universe, and *Sarva Bhootha Hithe ratha*, or the welfare of every living thing. That is why Hindu Law-givers said : "He, who upholds the law (*Dharma*) will be upheld by it. He, who destroys the law (*Dharma*) will be destroyed by it." and "*Dharma* (the law) is the foundation of the universe." Of course, they were not then thinking of purely lay law.

SOURCES OF LAW.—This transcendent conception of law was responsible for the Hindus making the Vedas, Epics, Sastras, Puranas, approved customs of good men, and, finally, even the *conscience* of each man, the sources of law (*Dharma*), equally with King's decrees, and for making the King himself subject to the law equally with the meanest of his subjects. It is obvious that when this

transcendental conception of law was introduced into the world of men, who are subject to lust, greed, anger, avarice, envy and quarrelsomeness, it became mixed, diluted, twisted and distorted, like gold in the depths of the mines, and Hindu Law could no more be ideal than Roman Law or English Law.

THE LAWS CHANGE WITH THE TIMES.—One of the fundamental doctrines of Hindu Law was that the laws are not the same for all time, or for all persons, or even in all circumstances, a profound truth often lost sight of in other countries. Thus, it was ordered that in the Krita age, Manu's Laws should prevail ; in Threta, Gautama's ; in Dwapara, the Laws of Sankha and Likhita ; and in Kali, the Laws of Parasara. That was said to be so because the throne of Dharma, on which each man was expected to sit, had four legs in Krita, the age of truth ; three in Threta, the age of seeking after truth ; two in Dwapara, the age of vanishing truth; and only one in Kali, the age when truth has gone below the horizon, like the setting sun, but has, yet left its radiant colours in the sky. No one can sit on a throne in the same position when it has four legs, three legs, two legs and one. One has to change one's place, if one is to keep one's balance. So, too, every nation has to change its laws in every age, if it is to keep its equilibrium.

CUSTOMS AS VALID AS ANY OTHER LAWS.—Another result of this conception of law was that each caste, asrama, family, guild and tract, had its own approved customs, which were as valid as law, like the King's decrees themselves. This recognition of customary law, not only for places, but also for communities, families and asramas, saved India from stark oppression and drab uniformity, and enabled the roses, jasmines, champaks, lotuses and sunflowers to grow and develop in their own ways, with their peculiar colourings and perfumes.

PUNISHMENT TO SUIT THE CRIMINALS.—People too were punished differently for the same offence, according to their age, sex, etc. Minors were never punished. So,

too, men were punished twice as much as women for most of the offences mentioned by Kautilya in his Artha Sastra, the reason being, of course, that women, by themselves, would not have committed those crimes in many of the cases, and that men must have been behind those crimes.

PUNISHMENTS TO SUIT THE ACTS.—Again, the same act would be viewed differently according to the circumstances. Thus, as unattended elephant goring an innocent passer-by rendered its owner liable to twice the punishment which would have been awarded if his mahout was present and had tried his best to prevent the deed. A passer-by wantonly provoking an unattended elephant, and getting gored by it fatally, was expected, out of his assets, to provide a sufficient quantity of cloth for wiping the tusks of the elephant clean, and to offer drinks and refreshments to the elephant for the unnecessary exertion caused to it by him. A man committing adultery with an ordinary woman was punished by mutilation of the offending parts, or by branding on the forehead with a repugnant figure. But, a man who committed adultery with the Queen of the land would be boiled alive in a pot (*kumbhi-pakam*). This difference in punishment is not so unique as it seems, for, even to-day, under the English Law, adultery with the Queen is high treason, punishable with death, whereas adultery with an ordinary woman is not at all punishable. The object of this discrimination is to see that the people do not get a bastard to rule over them, and that the purity of the "sacred" blood of Kings is ensured.

CONSTITUTIONAL LAW. KING, TOO, SUBJECT TO THE LAW.—The King, under the Hindu constitutional law, was only a Dharma *Pravarthaka* or the supreme executive officer of the law, and was not above it, as theoretically in England, where the King can do no wrong. This was not merely a pious sentiment. It was intended to be, and was often, carried out in practice. Thus, Asoka had his Queen, Tishyarahashita, executed for her murderous activities against Kunala. The Chola King had his son

crushed under chariot wheels for culpably running over a calf. Sivaji had his son, Sambhaji, imprisoned for outraging the modesty of a woman. When people talk of the autocracy of the ancient Hindu Kings, they show a deplorable ignorance of Hindu Law, customs and practice. Kalidasa and Bhavabhuti asked the Kings to act according to the wishes of their subjects. So did Vasishta and Viswamitra. Sri Rama abandoned Sita, whom he loved like his own self, in deference to a supposed desire of his subjects. No King was allowed to rule by himself, like Henry VIII or Louis XIV. Every monarch had to have a Council of Ministers, 16, or 32, or 48, or even 500, in number, according to the circumstances. Chanakya said that a single wheel could never drag a chariot, or a King rule a State by himself. Often, there were three concentric rings of ministers, the widest, corresponding to Privy Councillors, the middlemost, corresponding to Cabinets, and the innermost to inner Cabinets. The King was asked to give up his own personal likes and dislikes, and adopt the likes and dislikes of his subjects.

THE KING, A SERVANT OF HIS PEOPLE.—The King had to work as hard as any of his subjects. Kautilya has said " The King shall never cause his petitioners to wait at the door, or make himself inaccessible. He shall personally attend to matters relating to Gods, Brahmins, cattle, sacred places, the aged, the afflicted, the helpless, and women. He shall also attend personally to the national calamities, which are eight in number, *viz.*, famine, floods, pestilential diseases, demons, fires, rats, serpents and tigers." Even, to-day, in India, the last five have been inadequately attended to by the State. Though there are at least a thousand million rats and a hundred million serpents in this country, there has been no State action against them on an organised and concerted basis. Again, this great statesman remarked. "The whole world revolves on the belly. *Danda Neethi*, or the science of government, with rewards for the virtuous, and punishments for the criminals, is essential to safeguard the Vedas,

civilized life and salvation itself. The progress of the world depends on good government. Punishment is necessary so long as man is man. When this is allowed to go into abeyance, the law of the fish or *Matsyanyaya* will prevail, and the strong will swallow the weak." His great insight in this matter was, of course, due to the fact that he was the supreme Judge of administrative law, whereas the writers of the Dharma Sastras were lawyers dealing with religious and secular law on a theoretical basis.

Mixed Courts.—Here, we come to another great contribution of Hindu Law to world jurisprudence, namely, the combination of law and administrative law. It was felt in England, at the beginning of the 19th century, that justice was not efficient in some branches, owing to the absence of administrative courts, or *droit administratif*, as in France. And the defect was remedied by vesting various executive officers with judicial functions, and making their decisions final, a thing which a Lord Chief Justice of England has called the " New Despotism", forgetting, perhaps, the " Old Despotism " of legalists. Kautilya says that in the chief towns, districts, provinces and frontier towns, three members acquainted with the Dharma Sastras, called *Dharmasthas*, and three ministers of the King, called *Amatyas*, should sit jointly and carry on the administration of justice. It is something like the Board of Revenue sitting with the High Court, or the Collector with the District Judge, and is, certainly, a very progressive idea far in advance of the times, and eminently suited to a complex and modern civilization. A mere Judge, without executive or administrative experience, may not know about survey, landmarks, crops, manures or weapons, knowledge which his administrative brother could supply easily. On the other hand, an administrative officer may miss the wood for the trees, and fail to grasp the essential purpose of law and justice in his attempt to solve the immediate problems ; his judicial brother will be able to remedy this defect.

JUDGES.—Judges, whether judicial or administrative, were expected, under the Hindu Law, to deliver their own independent and impartial judgments. No king dared to punish a Judge who was known for his probity, however unpalatable his judgment might be. As Justice Cat observed, in the Panchatantra, "He, who, from either pride or avarice or anger or prejudice or fear, decides a case wrongly, or unjustly, goes to hell. He, who does not give *his own decision* from the judgment seat should be shunned from afar." And this was no empty show-case ideal. Ram Sastri, Maryada Rama and others show that this ideal was translated into practice.

BENCHES.—The Hindus seem to have been the first to think of Judges sitting in Benches, and not singly, doubtless copying the practice in the age-old Panchayat Courts. They also allowed Judges to try all cases from murders to thefts and criminal misappropriations, from disputes about inheritance and adoption to suits for damages against washermen's guilds for loss of colour and sheen caused by washing.

REVISION.—Judges were exhorted to revise their wrong judgments at once, and even *suo motu*, the moment they had reason to suspect them to be wrong. No technicality, no rule of law, or rule of the court, was allowed to stand in the way of that, as often happens with modern tribunals of the highest authority. Thus, it is recorded in a story in the Panchatantra called "Self-Created Evils," that the barber, who was sentenced to death by the Judges on the perjured evidence of his wife and was actually taken to the place of execution and was about to be executed, had his case tried over again on a new witness, Deva Sarma, going to the Judges and exposing the perjury, and was released, the perjuring woman's nose and ears being cut off instead, for her adultery and perjury. I wonder whether any Judges in any democracy would have had the freedom to do this, let alone the inclination.

OBITER.—Judges were encouraged to deliver weighty *obiter dicta* and to narrate stories in courts for the delectation of litigants, and to point out many a moral and to rub it in with a suitable parable. Courts were not in those days mere resorts of black-robed lawyers and warring litigants alone, but were attended by the masses for their delectation, instruction and improvement. Thus, there was a close assimilation of courts to the other national institutions, like choultries, temples, fairs, festivals and palaces, instead of making courts stand out, with jails, as houses of correction, forbidding and dreaded.

INTERNATIONAL LAW.—The Hindu Law was, perhaps, one of the earliest to recognise the necessity for international law, both private and public. Clear traces of it are found in the law books, epics and Artha Sastra. Even Greek observers, like Megasthenes, have testified to the scrupulous observance of these rules. Thus, foreigners were allowed to have their own private law in the Maurya Empire, and even when they died, there was a department of Government to deal with their properties and preserve them for their heirs. The laws of war were much more humane than in the 20th century. It was considered a punishable offence for a soldier to attack a non-combatant like a farmer. Now, of course, non-combatants are preferred, only for attacking them first without the least risk to the attacker. The person of an ambassador was sacred, and not even the most insulting ultimatum delivered by him exposed him to the least risk of punishment. Many people are, owing to the absence of really independent Hindu monarchs for the last so many centuries, ignorant of Hindu rules regarding ambassadors, and private and public international law. These rules have been atrophied by lack of use, like the leg of a man stricken with palsy or rheumatism.

CONVICTIONS AND ACQUITTALS.—As regards the principle regulating convictions and acquittals, the Hindu Law was no whit behind the most modern ideas. The King

was directed to fast for *one* day if a guilty man escaped unpunished, and to fast for *three* days if an innocent man was convicted. This is certainly a sounder idea than the old rule of Roman and British Law " Better that ten guilty escape than one innocent be convicted.", which rule does not punish the King and the government for allowing the guilty person to escape punishment.

Collective principle.—There was also a spirit of collective responsibility for crimes and murders, making for a much more social and humane aspect of the law. Even in the distant Chola country, the rule of Hindu Law was that a village community should make good to a person the value of the articles stolen or robbed from him within its area, and give compensation to persons murdered or maimed within their limits. This collective responsibility naturally led to a diminution in crime. It is the general absence of this collective responsibility in modern times that is responsible for the apathy of even educated men regarding crimes committed on others. A funny instance comes from olden days, of two respectable village officers carrying, at dead of night, the corpse of a person murdered within their limits to another village, in order to save their villagers from paying the compensation amount ! These worthies were detected in the very act, and the village was, according to the Hindu rule of punishment suiting the crime, fined four times the usual amount. Even in modern times, when crimes become rampant, punitive taxes are levied, and punitive police stationed, following this ancient principle of Hindu Law. Only, since the principle has not been followed from day to day, it appears in a particularly oppressive form in these instances, like a man, who eats things without discrimination every day, being forced to take the disgusting castor oil to clear his system when it gets too rotten.

Emphasis on Rewards too.—One remarkable thing about the Hindu Law was that it relied on rewards for good conduct, equally with punishments for bad conduct,

to maintain righteousness in the land. This of course, is not also unknown to modern law. Instances in point are money rewards and certificates given by the police to people who help them in the detection of crime, and titles awarded to deserving persons. Here, too, the Hindu Law believed in the collective principle. Thus, all the people of Limbinigrama (Rummindei) had one-eighth of their taxes remitted permanently by the Emperor Asoka, because the village gave to the world a Buddha.

Ex parte Decrees.—The Hindu Law had rules about *ex parte* decrees and dismissal of suits for default from a very early period. This was because no man's consent to be tried for an offence, or to have his cause tried by the King's Judges, was deemed to be necessary as in medieval England, where heavy stones or other weights were placed on an accused's chest, and he sometimes killed (*peine forte et dure*) in order to extort from him his plea and consent to be tried by his country, namely, a Judge and Jury.

Law of Evidence.—The Hindu Law of Evidence, too, was very sensible. Judges had a right to get at the truth by adopting whatever expedient they considered necessary, like Solomon's offering to cut a baby into two. Thus, the famous Judge Maryada Rama held an identification parade of a disputed horse by two persons (the alleged owner and the alleged thief), and when the thief identified it far quicker than the owner, not at all an uncommon thing, he gave judgment in favour of the owner, explaining that, though the identification parade had been ostensibly held for the men to identify the horse, its real object was for the horse to identify the men, and that he had seen the horse kicking its legs when the thief touched it, but remained pleased and quiet when the owner touched it. So, too, another day, when a woman, accused of stealing a hen and eating it up, denied it, Maryada Rama casually remarked to a fellow Judge " See the impudence of this woman, who, with a feather of the stolen hen still on her hair, denies having stolen it !",

and the woman at once put her hand to the head to take out the offending feather, and was forthwith questioned closely and made to admit the offence. So, again, when ten persons, one of whom had certainly stolen a thing, were put up before him in order to find out who the thief was, he gave them all sticks, a cubit long, and asked them to come the next day, assuring them that the Gods would make the stick of the thief one inch longer, and the real thief, in terror, cut off one inch of the stick so that it might be only a cubit long the next day, and was found out by this tell-tale act, and questioned closely, and made to admit the offence. I wonder whether any modern courts will be allowed to find out the truth by such methods. Yet, no sane man can say that it is not a good and proper thing to do. The best of laws are, after all, intended to find out the truth, and not to bury it in a mass of legal jargon and meaningless procedure.

Gradation of Value in Evidence.—One of the principles of Hindu Law was that documents had to be preferred to oral evidence, and oral evidence to ordeals. The reason for the preference of documentary evidence was that, from the date of the documents, they would cease to lie, if untampered with, unlike witnesses who might develop their stories from time to time, and who have, therefore, been somewhat uncharitably, classified as liars, damned liars, and experts. It will be noted that the Hindu Law put 'ordeals' *last*, unlike the Anglo-Saxon Law which put ordeals *first*.

Limitation.—The law of limitation of the Hindus was sensible and carefully graded. Thus, for gardens, paddy fields and houses, the period of limitation was 10 years; but, in the case of temporary pens on common grazing grounds, the moment all the cattle were removed, the right was barred.

Witness Batta.—There was a standing rule that the defeated party should pay the travelling allowance and daily allowance to the witnesses on both sides, and the scales of these allowances were far more liberal than the

five annas per day vouchsafed to witnesses in criminal cases now.

Experts.—Surprisingly enough, the Hindu Law had a strong *penchant* for experts, who were called in for purposes ranging from determining the reasonable wages that had to be settled on a *quantum meruit* basis, to deciding how much colour would be lost on the washing of a Benares silk cloth by a diligent and skilled washerman. One funny incident of the use of experts is recorded in the Artha Sastra. When a man, about to be killed by a tiger, or elephant, or by fire or flood, is rescued by another on his promise to offer to his rescuer the whole of his property and also to surrender himself, wife and children as slaves, the court should call a committee of experts, and decide the quantum of the real remuneration due to the rescuer for such a service, ignoring the promise made by the rescued.

Guilds.—The Hindu Law recognised trade and caste guilds which entered into all kinds of contracts.

Wages.—It also had a very kindly attitude to labourers prescribing that ten times the wages should be given to them when they were not paid in time. Many masters, and even Local Boards, would have come to grief under this clause, which has unfortunately gone out of use in modern times, and has not even been revived like the law of *damdupat*, another remarkable instance of the Hindu Law's concern for the poor, the oppressed and the afflicted.

Days of Grace.—Another instance of equity in Hindu Law was the giving of seven days' grace for the repayment of money, fulfilment of building contracts, etc., further allowance being made for sudden deaths, and calamities.

Nuisance Laws.—The Hindu Law was also, like all modern laws, very solicitous about public health and hygiene. People who did not keep dust bins and water closets in their houses were heavily fined. They were fined double the amount, if they allowed the filth from

their houses to flow down to other people's houses. People who obstructed gutters were fined 12 panas. Persons who stood by watching a fire without water pots in their hands to extinguish it, were heavily fined.

IMPERSONALITY.—The Hindu Law was as impersonal in giving relief as the modern English Law. Thus, forcing oneself on a prostitute was also punished, and, not merely forcing oneself on a respectable woman. And a man with many previous convictions had a right to say that he did not commit the particular offence charged against him. Unlike in English law, a suit or complaint could be filed against the King too, in most cases.

MARRIAGE LAWS.—Now, let us examine some of the principles of Hindu private law. The ideal of marriage was very high. There were eight known forms of marriages, and a grand maxim "Any kind of marriage is approvable, provided it pleases all those that are concerned in it" was laid down by Chanakya in his Artha Sastra. What a pleasing contrast it is to the narrow interpretation of a legal marriage by the English Law, which would hold all orthodox Hindu and Muslim marriages to be invalid, and the offspring to be illegitimate!

GUARDIANSHIP.—Unlike many other systems of law, Hindu Law set its face against allotting children to one of the partners, husband or wife, and gave the right jointly to both the parents, if they were living, or to the sole surviving parent, stating that the sower of the seed and the owner of the field were both equally entitled to the crop.

MARRIED WOMEN'S PROPERTY.—In this matter, women were comparatively generously treated under the ancient Hindu Law, much more generously than in any other ancient system of law, except late Roman Law. The wife was entitled to a minimum maintenance of 2,000 panas (Rs. 1,000) against the reversioners of her husband, besides being entitled to all the jewels, whatever their value, and to any other Stridhan property she might have. Needless to say, modern Hindu Law, as interpreted by our courts, does not give her a tenth of these rights,

although we boast that we treat our women more considerately than our ancestors. It is well-known that Vignaneswara wanted to make women fully equal in property rights to men, and that the scheme fell through owing to a decision of the Privy Council which followed the reactionary views of some later Hindu Commentators in days when English women, too, had not benefited by the various Married Women's Property Acts.

WIFE-BEATING.—Even the beating of wives was regulated, as, of course, in mediæval England, the only difference being that, in England, Judges recommended a rope or a cat's tail for the beating, whereas in India, a split bamboo, which did not exist in England, was recommended instead, three moderate blows being the limit of the husband's freedom, anything in excess being punished as assault against a third party.

POLYGAMY.—Polygamy was allowed only under very strictly limited conditions, namely, if the first wife did not bring forth any children for eight years, or bore only still-born children for ten years, or only female children for 12 years. So, it can be practised with far more impunity under the modern Hindu Law than under the ancient Hindu Law.

RESTITUTION OF CONJUGAL RIGHTS.—Even an action for restitution of conjugal rights was known to ancient Hindu Law, and was freely exercised, the petitioners being mostly senior and discarded wives. But, the Hindu law-givers were well aware of the folly of trying to enforce such orders, either by specific performance, or by imprisonment. They fined the recalcitrant husband 96 panas in case of disobedience of orders, and gave the money to the disappointed wife, in addition to her rights to maintenance, jewels, etc.

WIFE'S FREEDOM OF VISIT.—Unlike in modern India, where a jealous husband can, in practice, with impunity, prevent his wife from stirring out of his house, under the ancient Hindu Law, a husband preventing his wife from going to the houses of kinsmen on occasions of death,

marriage, disease, calamities and confinement of women, was liable to a fine of 12 panas.

INTESTATE SUCCESSION.—About intestate inheritance, the Hindu Law was very sane. There was no rule of primogeniture or undue favouritism to the eldest or the youngest son. Properties were directed to be divided equally between the sons, even mud pots and grinding stones being liable to be divided. Sometimes, a very small extra share was recommended to be given, at the discretion of the brothers, to the eldest brother, as *jyeshta-bagham*, in order to enable him to meet the expenses of the *sraddhas* of the parents, thrown on him exclusively in those days, or to the youngest son who had not been fed at family expense for so long a period as his elder brothers and deserved something as compensation for this. Hindu Law saw no reason to give a man absolute powers of disposal over *ancestral* properties, except for family benefit and necessity, but gave him such rights regarding his *self-acquired* properties.

SALES OF LAND AND HOUSES.—Hindu Law had very equitable rules regarding the sales of lands and houses. These sales had to be cried out in the presence of respectable persons of the locality, with the price offered by the vendee, and anybody in the village offering a higher price would get the lands and houses unless the original vendee agreed to make a parallel bid. This had three effects. First of all, it prevented nominal sales and low prices. Secondly, it made the sales public and notorious, and disputes about them difficult. Thirdly, it prevented the village community from having a discordant element thrown in its midst as vendees, with the inevitable crop of litigation or break-up of harmony in the village community.

DISTRIBUTION OF PRODUCE.—About the crops, the Hindu Law rule was that one half of the crop should go to the tiller of the soil or other person (like a man engaging coolies to cultivate under his supervision) who actually shared in the profit or loss resulting from the crop. The

waram system in the Andhra country under which the tenant gets one-half is a survival of this. One-sixth of the crop was to go to the King as tax, and the remaining one-third to the landlords, immediate, intermediate or ultimate. If this rule were adopted now, many members of the depressed classes, who are often the actual tillers of the soil, will become rich and respectable, instead of their share of the crops being swallowed by innumerable middlemen and parasites.

DEFAMATION.—Lastly, Hindu Law is remarkable for its enlightened view regarding defamation and kindred offences, which, in many primitive societies were not punished at all. Defamation of nations, castes, communities, assemblies, guilds and gods were all punished equally with defamation of individuals. It was laid down that the wound caused by an arrow would be cured, in course of time, but not the wound inflicted by an abusive and insulting expression. Calculated defamation of a wife's character was also held to be "legal cruelty" towards her. "Truth" was no justification, unless "public benefit" too was proved. Thus, a blind man could not be called blind, unless it was to show that he could not have seen something he pretends to have seen, etc.

LAW-MAKERS.—Finally, the unique beauty of Hindu Law was that the persons who developed it from time to time were Sages, Kings, and caste heads, each group with unique gifts and capacities, and not an assembly elected on a haphazard system, and giving no sure guarantee of either wisdom or deliberation or even of public weal being the sole guiding motive.

FROM STATUS TO CONTRACT
(*A note on Sir Henry Maine*)

BY

DR. A. APPADORAI, M.A., PH.D.

Surveying the history of peoples from primitive times to his day, Sir Henry Maine made the brilliant generalization in his *Ancient Law* (1861) that the movement of the progressive societies " has hitherto been a movement *from status to contract*."[1]

In the infancy of society, custom was the king of men; men were *born* into the station and the part they were to have throughout life, as they still are among the peoples who preserve their earliest conceptions of social order. Merit could not avail to raise any man above his parentage ; aptitude was allowed to operate only within the sphere of each man's birthright. He who is born a slave, let him remain a slave, the artisan, an artisan; the priest, a priest— this is the command of the law of status. Family and caste discipline were reinforced and supplemented by religious opinion. To break the custom of the house and of the tribe was to invite the curse of gods. Superstition helped to compel conformity. Under such conditions, it is clear, there was hardly room for the play of individuality.

Starting from the terminus of history, from a condition of society in which the relations of all persons were summed up in the relations of family, we seem, said Maine, to have steadily moved towards a phase of social order in which all these relations arose from the *free* agreement of individuals. This means that men's duties and liabilities

1. Ancient Law, Chap. V.

came more and more to flow from willed action instead of from the accident of social position recognised by law. Already in Maine's day, the progress achieved in this direction had been considerable. The status of the slave had disappeared ; it had been superseded by the contractual relation of the servant to his master. The status of the woman under tutelage, if the tutelage be understood of persons other than her husband, had also ceased to exist ; from her coming of age to her marriage all the relations she might form were relations of contract. So too the status of the son. If any civil obligation bound together the parent and the child of full age, it was one to which only contract gave legal validity.

II

That Maine's analysis is inadequate from the legal point of view (even as applied to history to his day) is now well-known : his generalization was one from Roman legal history and had no basis in Anglo-American legal history.[1] Indeed, it is arguable[2], that it did not completely fit in with the facts of Roman legal history itself. But in social development, the change which Maine traces, *viz.*, 'the leaving of men to have their careers determined by their efficiencies', as Spencer put it, was a momentous one. In Europe the roots of this change could be traced to the decline of the feudal system and the epoch of invention, discovery and expanded trade in the sixteenth and seventeenth centuries. The feudal society of the Middle ages rested, as Pound points out in a famous Essay[3], on the orderly maintenance of the social *status quo.* This conception answered to the needs of mediaeval society in which men found relief from anarchy and violence in relations of service and protection and a social organization which classified men in terms of such relations and required them to be held to their functions as so determined. The discovery of America, the work of exploration and

1. Pound, The Spirit of the Common Law (Boston, 1921) especially pp 28–29.
2. Pound, Interpretations of Legal History (Cambridge, 1923) Chap. III.
3. The End of Law, in An Introduction to the Philosophy of Law, (London, 1937), p. 79.

colonisation were carried out largely at their own expense by individuals with the minimum of support from their governments. It afforded scope for the display of individuality. The world, as it were, suddenly grew larger, and "the farm boy who hitherto had either to become an ecclesiastic or abandon all hope of changing the status in which he had been born now saw himself Viceroy of Mexico or another John Smith, and it was small wonder if he forsook the plough for the ship." The new social need was, therefore, not to keep men in their appointed grooves, but to leave them free while they achieved what they might for themselves in a world that continually afforded opportunities to the active and the daring. The Industrial Revolution further emphasized the same need. The manufacturer needed freedom from social restraints to enable him to make the fullest use of the new opportunities in industry and trade. Jurisprudence kept pace and the end of law came to be conceived as a making possible of the maximum of individual free self-assertion. *Laissez-faire* became the accepted creed of Government policy.

III

Does Maine's view of social development hold good of the period since?

Eighty years have passed by since he formulated it. The period has been succinctly described as the 'machine age.' The social and economic results of the Industrial Revolution have more fully manifested themselves. Broadly speaking, the results may be summarized as the increasing interdependence of men—a corollary of increasing specialization and division of labour. Our needs whether of dress, food, housing, health, security, knowledge or amusements depend more than ever upon the work of other men. And it is an elementary truth in politics that the greater the relations of man with man, the greater the need for regulating these relations by means of law—if we must attain social justice and protect the weak against the strong. Unlimited individualism, it was soon realised,

VIJNANEŚVARA AND LAKṢMĪDHARA

BY

RAO BAHADUR K. V. RANGASWAMI AIYANGAR

Lakṣmīdhara is as eminent among the authors of digests (*nibandha*) as the famous author of the *Mitākṣarā* is among commentators. By a curious coincidence, both were contemporaries, and each was commissioned by a powerful ruler, who claimed *sāmrājya*, to compose a *Dharmaśāstra* work, which would prove a fit monument of the reign of the patron. Another famous commentator, Aparārka or Aparāditya of the Śilāhāra dynasty of Konkan, was also a contemporary of the other two great *smārtas*. How far they were coeval we have no means of ascertaining with certainty. Vijnāneśvara is considered as having made no reference in his great commentary to either of his rivals. It has also been assumed that he is the oldest of the three, and wrote his work long before the other two started their compositions. In regard to Aparārka's silence about the *Mitākṣarā*, of which his ignorance cannot be presumed, as he was so close a neighbour of Vijnāneśvara's patron Vikramānka or Vikramāditya VI of the Cālukya dynasty of Kalyāṇa (c. A.D. 1076 to 1127) it was suggested by Jolly in 1883 that "the fact that he never mentions the *Mitākṣarā* by name, has been explained as a result of Indian etiquette, which does not allow a royal author to notice expressly the opinions of another sovereign's servant by name." Mr. P. V. Kane[1] rejects the suggestion and points out that "it is doubtful whether any such etiquette ever existed," and that "works of royal authors such as the *Madanapārijāta* or the *Sarasvatīvilāsa* do not appear to have followed the rule. Mr. Kane also

1. *History of Hindu Law*, 1885, p. 13; *Journal of Indian History*, III, p. 17.

points out[1] that Aparārka "studiously avoids the mention of every ancient commentator."

The reign of Lakṣmīdhara's patron, the Gāhadvāla ruler Govindacandra of Kānauj, extended from about A.D. 1110 to 1154, the date of his latest extant record. But, during the nominal reign of his father Madanapāla (A.D. 1099 to 1110) he was actually exercising the functions of sovereign, and there is a record of a gift which he made in that capacity bearing a date equivalent to A.D. 1104.[2] Along with the two powerful rulers of Hindusthān and the Dakhan, mention must be made of an equally powerful and eminent contemporary ruler, the Coḷa emperor, Kulottunga I (A.D. 1070 to 1120), who ruled the whole of the peninsula south of the Tungabhadra, along with a considerable portion of the old Vengi kingdom of the Eastern Cālukya dynasty.[3]

It is noteworthy that each of these powerful kings ruled for about half a century, that they were all ambitious and warlike as well as extremely capable, and that the comparative peace which India enjoyed for about three generations was largely the result of the wholesome respect that each of these had for the power of the others. They were all patrons of letters. None of the three was young when he ascended his throne, and had no previous administrative experience. It is valid to assume an intense feeling of emulation among the three kings, and there is evidence to show that their diplomatic activities were directed to produce one another's encirclement.

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1. *History of Dharmaśāstra*, 1930, p. 330.

2. The Basāhi plate of *Mahārājaputra* Govindacandra, *Ind. Ant.*, XIV, pp. 101-104; R.S. Tripāṭhi, *History of Kanauj*, 1935, p. 305.

The earliest extant record of Govindacandra *as king* is the Kamauli plate of V.S. 1171, bearing a date equivalent to the 15th October, 1114, (*Epig. Ind.*, IV., pp 101-103), but it is probable that he came to the throne in A.D., 1110 four years earlier. The Rāhan copper-plate of Madanapāla and Govindacandra dated V.S. 1166 (3rd January 1109 A. D.) purports to be issued by command of Govindacandra himself and contains an injunction to implement the gift to *Rāja-rājñī-mantri-purohita-amātya-akṣapaṭlaka-bhāṇḍāgārika - bhiṣak - senāpaty - antaḥpurika- samasta - dhikāripuruṣādīn*, though Govindacandra is still designated as *Mahārājaputra* only. It ends with an allocution on the transitoriness of life and the merit of gifts, and does not state as in the plate of A.D. 1104 that it received the concurrence of the Queen or any one else. The designation applied to Govindacandra is *Mahārājaputra*, not *Yuvarāja*, as in the Basāhi plate of A.D. 1104 (*Ind. Ant.*, XIV, pp. 100—104; J.A.S.B., XLII, pp 314—321).

3. Nīlakaṇṭha Śāstri, *Colas*, II, pp. 38—39.

The conditions must have strongly favoured the movement of ideas, as represented in capital literary works, throughout India in such times, even if we did not know that the tireless march of pilgrims to the *tīrthas* scattered over India should have facilitated the exchange of ideas and the rapid circulation of books of merit. Further, when a great king commissions the composition of a digest, or a commentary which would be as good as a digest of *Dharmaśāstra,* it is natural to presume that no effort would be spared to place all available material, including the latest, before the authors entrusted with so responsible a duty. The point needs some emphasis, as it is usually assumed, that the percolation of views in books takes at least a generation to reach countries other than those in which they were written. The history of *Dharmaśāstra* in India negatives such a view. It is therefore unnecessary to assign arbitrarily, on such an assumption, fairly long intervals between two works, which are believed to be connected by one alluding to or borrowing from the other, to allow of this penetration. Mr. Kane has, for instance, acted in this manner. He holds that the *Mitākṣarā* "must have been composed at the latest before 1100 A.D.", because "Vijñāneśvara is named in the *Kalpataru*", which he holds as having been composed in the second quarter of the 12th century, and "the *Kalpataru* also mentions Vādibhayaṃkara" a writer supposed to have been, on the authority of the *Vīramitrodaya* a follower and critic of Vijñāneśwara. On somewhat similar grounds among others the composition of Aparārka's commentary is put at about 1125, almost the date assigned by Mr. Kane to the composition of the *Kalpataru*.[1]

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1. The point is illustrated by Lakṣmīdhara's reference to Gopala, the author of the *Kāmadhenu* as his *vayasya, i.e.,* contemporary and friend, in mentioning previous works compared with which his own *Kalpataru* is markedly superior. Mr. Kane, (*op. cit.* p. 296), places Gopala atleast a generation before Lakṣmīdhara, and assigns him to the period between 1000 and 1100.

The references are worth quoting in full:

Paurāṇīreva vāṇīh kvacitakṛtakṛtau kvāpi bhūyah smṛtīnām
Gopālas-tadvayasyaḥ svakṛtiviracanam vākyarūpeṇa cakre
Śrauta-smārtādisāraiḥ vibudhamanohārī kariṣyate ayam
Mimāmsottāsitārthaiḥ apṛthurathakathāātītarandhraprabandhaḥ,

Yasotthitau sthitimatī na Mahārṇavaśrīḥ
Nidrām dadhāti yadadhaḥ kila Kāmadhenuh
Tasyāstaniṣyati ratim vibudhadvijānām
Ānanditum kimu na Kalpataroḥ prarohaḥ.

Thus for the determination of the dates[1] of these cardinal works our reliance must be mainly on internal evidence of borrowing or obligation and the dates of the royal patrons. We may leave out the work of Aparārka, which must have been composed when he was a king (A.D. 1110 to 1140) and when he was in the height of his power and prosperity, which would narrow the limits further, as we know that after a disastrous war with the Kadamba king of Goa, Jayakeśin II (*circa* 1104 to c. 1147-8), in which he lost and regained most of his territories in North Konkan, he had the needed peace of mind for such an undertaking as the composition of his famous commentary only after 1126, and concentrate our attention on the *Mitākṣarā* and *Kalpataru*.[2]

Mr. Kane discovered in the course of his very thorough research two allusions to the author of the *Mitākṣarā* in a modern transcript of the *Vyavahārakāṇḍa* of the *Kalpataru* in the Sarasvatibhavan at Benares. This transcript, which I have had occasion to utilise in the preparation of my edition of the *Kalpataru* for the Gaekwad's Oriental Series, is apparently a copy of a manuscript in fairly modern characters in the Library of the Royal Asiatic Society of Bengal, which itself seems related to an older Maithili manuscript in the Rāj Library at Darbhanga. All these have been available to me. The three manuscripts have to be treated as one. The oldest manuscript which I have used is from the Library of H. H. the Mahā Rāṇa of Udaipūr in Mewar. It is undated but belongs apparently to the 16th century at the latest. A manuscript of which a copy was secured from the Raghunāth Temple Library at Jammu seems to be also dependant on the group mentioned above, and to be identical with them except for copyists' errors. It bears the date *Samvat* 1846.

The first of the two passages occurs in the chapter on Ordeals (*divya*), sub-section *Kośadivya*, and Slaves (*Dāsyadhikāriṇah*). It runs, in most of the manuscripts, thus:

1. Mr. Kane's conclusion is that the *Kalpataru* "must have been written between 1100 and 1150 A. D., and probably in the 2nd quarter of the 12th century." (*op. cit*, p. 317).

2. A. S. Altekar, " The Silāhāras of Western India", *Indian Culture*, II, pp. 412—413. "The turning battle in the Silāhāra-Kadamba war was fought in A. D. 1126. As a result of this victory Aparārka ceased to be a Kadamba feudatory and regained most of his hereditary possessions."

"Śodhyasya janani tātaḥ putro vā tat sahodaraḥ
Bhāryā putravatī dharmyā jnātayaḥ parikīrtitāḥ"

iti Vādibhayaṃkare Bṛhaspativacanāt.[1]

In *Vīramitrodaya*, Vyavahārakāṇḍa, Vādibhayaṃkara is described as a work by a follower (*anuyāyī*) of Vijñāneśvara, who exposed an apparent inconsistency in his master, in explaining a verse of *Yajnavālkyasmṛti* (II, 51). The passage runs thus:

"Vijnāneśvarānuyāyī yathātra Vādibhayaṃkarakridāha:

'Aho bata jagatkhyāta-Vijnāneśvara-yoginaḥ
Pūrvāpara-virodhepi nānusandhānamadbhutam'[2]

This passage is wanting in the Udaipur Ms., which is the oldest used, while it occurs in the rest.

The concurrence of testimony in four Mss. will create a presumption in favor of the authenticity of this text as part of the original *Kalpataru*, if the manuscripts were independent and not transcripts of one original as is the case. We have thus a conflict between two sets of manuscripts, one furnishing the above text and the other omitting it.

Is there any method of checking the genuineness of the citation from Vādibhayaṃkarakrit? It seems to me that there is. The verse is alleged to be a text of Bṛhaspati which Lakṣmīdhara took second-hand from the above scholiast, quoting the source of his information. Till now the writer who furnishes this citation from Bṛhaspati is known only from this passage and the other quoted by Mitramiśra in *Vīramitrodaya*. A passage from Bṛhaspati, if authentic, will rarely be missed by digest-writers and commentators, and especially by writers who take delight in bringing into as many authoritative citations as possible, like Mitramiśra himself. It is remarkable that not only is the Bṛhaspati quotation missing in Mitramiśra's work, at the corresponding place and context, but it is missing in such special studies of *divya* (ordeals) as Raghunandana's *Divya-tattwa*. It is even more stranger that it is unavailable among

1. *Op. cit.*, p. 290, notes 640 and 641. It appears to me that Vādibhayaṃkara is the name of a work, rather than of an author, as assumed by Mr. Kane.

2. *Vīramitrodaya, Vyavahāraprakāśa*, Ed. Jibānanda 1875, p. 350.

the ninety-two verses from Bṛhaspati which occur in the digests and commentaries as relating to *divya*. The passage, cited on the authority of Vādibhayaṃkarakrit, is also tautologous, when considered with the following genuine verse of Bṛhaspati, which is reproduced in many digests to show that the effect of the ordeal should be watched not only on the person subjected to it, but on his wife, children and effects:

Saptāhādvā dvisaptāhād yasya hānir na jāyate
Putradāradhanānām ca sa śuddhaḥ syānna saṁśāyaḥ

(Alternative readings: Yasyārtir na prajāyate and Ubhayatrāpi).[1]

The alleged quotation seems to add to the number of persons (to be watched for the effect of the test) the parents, brothers and *jñātis*. But, as it mentions the wife and sons, who are already included in the above authentic verse, the tautology would justify the rejection of the alleged text.

In no other case has Lakṣmīdhara cited a source for a quotation from a writer so well known as Bṛhaspati.

If the *śloka* in question *is* authentic, it might have been brought in for the purpose of elucidating the term *jñāti*, in the following verses of Kātyāyana and Lakṣmīdhara's comment thereon, which precede the citation:—

"Atha deva-visamvāda tri-saptāhāttu dāpayet
Abhiyuktam prayatnena tamartham daṇḍameva ca.
Tasyekasya tu sarvasya janasya yadi tadbhavet
Rogognirjñātimaraṇam ṛṇam dadyātdamam ca saḥ.
Jvarātisāra-visphoṭāḥ sūlādiparipīdanam
Netraruggalarogaśca tathonmādaḥ prajāyate
Śirorugbhujabhangasca daivikā vyādhayo nṛṇām.

'Devavisamvādaḥ' Devakrto rogajñātimaraṇādirūpo virodhah."[2]

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1. *See* my forthcoming edition of the reconstructed *Brahaspati-smṛti*, VII, 65.

2 The passage may be rendered as follows :—

"(The judge) should strictly compel the accused to pay, after three weeks, in case of the befalling of the fateful calamities (on the defendant undergoing the *kośa* or the *taṇḍula* ordeal), a fine and the subject of the dispute.

If any one of the following befalling him alone and not all people (in the neighbourhood) *viz*. disease, fire, death of a relation (*jñāti*), then he

Bṛhaspati's alleged verse will then have to be treated either as a definition of the term *jnāti* or as a restriction of the general sense of the term for the special purpose of limiting the applicability of the test or ordeal only to *some*, as against *all jnātis*. The word '*śodhyasya*' at the beginning of the *śloka* shows that it was intended to be part of the general treatment of ordeals, as it refers 'to the 'person to be tested' (*śodhya*). If the *śloka* is intended to convey Bṛhaspati's idea of *jnātivarga*, it will show that he took a narrower view of the limits of *jnāti-varga* than other authorities. The *jnāti* circle will then include only a man's parents, sons, brothers, and the caste-wife, who has had male progeny. Others have construed the term more liberally. In the list of persons who are to honour the new bride, Yājñavalkya mentions the bride's husband, her own brothers, her *jnāti-varga*, her father-in-law and mother-in-law, brothers-in-law (*i. e.* brothers of her husband) and *bandhu-vargah*.[1] In explaining the verse, Viśvarūpa interprets the word *jnāti* (*jnātiśabda*) as 'maternal uncle and others' (*mātulādiḥ*).[2] Medhātithi in commenting on the word '*jnātayaḥ*' in *Manusmṛti*, III, 264 (254 in Jha's Edn.) distinguishes between *jnāti* and *bandhu* thus:

'Jnātayaḥ' sagotrāḥ: Matṛśvaśurapakṣāḥ 'bāndhavāḥ'.[3]

Kullūka follows the interpretation of Viśvarūpa in interpreting Manu's injunction[4] that one guilty of *mahāpātaka*

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should be made to pay the fine as well as the debt (which is the subject of the dispute).

The diseases brought on by the wrath of Fate are fever, diarrhoea, carbuncles, suffering from rheumatism, diseases of the eye and throat, insanity, headache and fracture of the arms.

"Devavisamvādaḥ, means calamities like disease and death of relations caused by Fate."

1. *Yājñavalkyasmṛti*, I. 82.
   Bhartṛ-bhrātṛ-pitṛ-jnāti-śvaśrū-śvaśura-devaraiḥ,
   Bandhubhiśca striah pūyāḥ bhūṣaṇa-ācchādanāśanaiḥ.

2. Ed. Gaṇapati Sāstri, 1922, Trivandram, p. 84 (T. S. S. No. 74).

3. Ed. Gangānāth Jhā, *Bibliotheca Indica*, Vol. I, 1932, p. 319.

The śloka of *Manusmṛti* (III, 264, in the ordinary editions and III, 254 in Jha's Ed. of Medhātithi) runs as under:

Prakṣālya hastavācamya jnātiprāyam prakalpayet.
Jnātibhyaḥ satkṛtam dattvā bhāndhavānapi bhojayet.

4. *Manusmṛti*, IX, 239:

Jnātisambandhibhiḥ tvete tyaktavyā kṛtalakṣaṇāḥ.

(inexpiable sin) should be abandoned even by his relations. He takes '*jñāti*' to mean '*mātulādi*', *i. e.*, the maternal uncle and others; but in explaining the same word in *Manusmṛti* (III, 264), he follows the distinction between *Jñāti* and *bandhu* made by Madhatithi. Bühler in translating the verse[1] has accordingly treated *jñātayaḥ* as equivalent to 'paternal relations' and '*bāndhavāḥ*' as signifying 'maternal relations,' a distinction which he repeats in translating *jñāti* and *sambandhi* in *Manusmṛti*, IX., 239. Mitramiśra[2] in interpreting the verse in *Yājñavalkya-smṛti* on the perpetual tutelage of women, construes '*jñātayaḥ*' as '*sapiṇḍāḥ*'. The *Śabdakalpadruma* gives an elaborate reckoning of *jñāti-varga*:—

"saptamapuruṣaparyantam sapiṇḍāḥ; tataḥ tripuruṣa-paryantam sakulyāḥ; tataḥ caturthaparyantam samānodakaḥ; tataḥaram gotrajāḥ".[3]

It will be seen that there has been wide disagreement among authorities on the signification of the term *jñāti*. It is incredible that an authoritative definition of it by a jurist of the eminence of Bṛhaspati should not have attracted the attention of commentators and *nibandhakāras*, and that it should be left to be gathered even by Lakṣmīdhara from an obscure writer like Vādibhayaṃkarakrit. If the verse attributed to Bṛhaspati is, on the other hand, a limiting clause attached to that of Kātyāyana and other writers about the kinsmen who should be watched for the effects of the ordeal, it is no less strange that so important a restricting clause should not have found its way in other later or earlier writers who treated of ordeals. The circumstances

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1. S.B.E., XXV, 1886, p. 384.

2. *Yājñavalkyasmṛti*:

Rakṣet kanyām pitā vinnām patiḥ putrāśca vārddhake,
Abhave Jñātayasteṣām na svātantryam kvacit striyāḥ.

The comment of Mitramiśra is:
Evam rakṣaṇasamarthānam pitṛādi putrāntānām asatve tadati-
Riktāḥ sapiṇḍāḥ rakṣeyuh eva svadoṣaparihārārtham.

(Chowkhamba Edn. of *Yājñavalkyasmṛti* with the commentary *Vīramitrodaya*, p. 150.)

3. Ed. Vasu, 1878.

in regard to this quotation are so suspicious that its ascription to Bṛhaspati *solely* on this passage referring to Vādibhayaṃkarakrit, which might have been interpolated into the text by an early reader of Lakṣmīdhara's digest, is not justified, and I have had to reject it in my reconstruction of *Bṛhaspatismṛti*, which is appearing in Baroda Oriental Series.

We may now consider the second ground of the view of Mr. Kane that Lakṣmīdhara quotes Vijnaneśvara. The Sarasvatibhavan transcript of *Vyavahāra-kalapatru*:—

Kṣatradharmastu brāhmaṇo brāhmaṇam dāsakarmaṇi na kārayediti Vijnaneśvara-svarasah

This sentence occurs almost at the end of a short paragraph in which Lakṣmīdhara discusses the effect of the injunctions of Nārada and Kātyāyana on the circumstances in which members of the four castes can become slaves (*dāsāḥ*). The paragraph is defective in the Udaipur manuscript and hardly makes any meaning; and it contains neither the name of Vijnāneśvara nor of the *Pārijāta* and of Halāyudha which occur in other manuscripts. A manuscript of the work, which belonged to the late Mahāmahopadhyāya Baccha Jhā of Dharbhanga gives a condensed version of the passage:—

"Tadūnam iti": śīlādhyayanānyūnam brāhmaṇam, śīlādhyayanasampanno brāhmaṇaḥ karmakarayediti yojanā; "aśubham" viṇmūtrsodhanādi; "kṣatraviṭśūdradharma" ityādi—kṣatryādidharmo brāhmaṇaḥ dāsakarmaṇi na kārayediti Bṛhaspatimatam ityarthaḥ.

A manuscript in the Dharbhanga Palace Library contains only the above short passage, with the following changes:

(*a*) It adds: "kāmataḥ tadicchayā" after "yojanā"

(*b*) It interpolates "brāhmaṇam" between "brāhmaṇah" and "dāsakarmaṇi".

This manuscript was copied for me through the Baroda Oriental Institute and bears its Stock Number 13929. Another manuscript from the Dharbhanga Palace, which was also copied for me (and which bears the Baroda No. 13928) gives the longer version, which occurs also in a transcript from Jammu, and which is virtually identical with the transcript in Saraswatibhavan used by Mr. Kane, and its source, viz., the Ms. in the Asiatic Society at Calcutta.

The longer passage, as edited from these manuscripts, runs as follows:—

"Śīlādhyayanasampanno brāhmaṇaḥ, 'kāmataḥ' icchantam, 'tadūnam' śīlādhyayanānyūnam karma karayediti yojanā. Tatrāpi 'na aśubham', viṇ mūtraśodhānikam, na karayedityarthaḥ. 'Kṣatraviṭśūdra-dharmastu' ityādi, kṣatriya-vaiśya-śūdrāṇām tu saguṇānām api sāvarṇye api kadācit dāsa-swāmi-bhāvo bhavet. Brāhmaṇastu 'sama varṇam' samānaguṇam dāsakarmaṇi na karayediti Bṛhaspatiḥ manyate ityarthaḥ. Iti Pārijāta - Halāyudha - svarasaḥ. Kṣatraviṭśūdradharmastu brāhamaṇaḥ brāhmaṇam dāsakarmaṇi na kārayet iti Vijñaneśvara-svarasaḥ. Sarvascāyam arthaḥ upagrāhya eva."

On an analysis of the manuscripts, it is seen that the references to *Pārijāta*, Halāyudha and Vijñaneśvara are found in three manuscripts, *viz.*, at Calcutta, Dharbhanga and Jammu, and a transcript of the Calcutta manuscript at Benares; and in three independent manuscripts, namely those at Udaipur, Dharbhanga Palace and Navani in Dharbhanga (belonging to Baccha Jha) the references are entirely absent.

In considering the authenticity of the references in this passage, it would be helpful to examine the reproduction (without the omission of even a word) of the whole of this section of the *Kalpataru* by Caṇḍeśvara in the *Dāsyādhikāravidhiḥ* chapter of his *Vivādaratnākara*[1] In this reproduction, the prose explanations which are missing in the group of three manuscripts, that give the shorter version of the comment reproduced above, are found as in the Asiatic Society's manuscript and those derived from it.

Caṇḍeśvara gives the crucial passage thus:—

"Brāhmaṇastu savarṇam samavarṇam samānaguṇam na kārayet iti Bṛhaspatirmanayate iti Pārijāta-Halāyudha-svarasaḥ. Kṣatraviṭśūdradharmastu brāhmano brāhmaṇam dāsakarmaṇi na na karayediti *Lakṣmīdhara-svarasaḥ*. Sarvascāyamarthaḥ upagrāhya eveti."[2]

It shoutd be noted that the view attributed to Vijñaneśvara as his personal opinion (*svarasaḥ*) is here ascribed by Caṇḍeśvara not to Vijñāneśvara but to Lakṣmīdhara himself.

1. Ed. *Bibliotheca Indica*, 1887, pp. 152—155.
2. *Ibid*, p. 153.

It is not open to contend that Caṇḍeśvara in giving the opinion as Lakṣmīdhara's committed an error; for, what is stated *is* the view of Lakṣmīdhara, as gatherable from the entire section, while it is *opposed* to the opinion of Vijnāneśvara, as given in the *Mitākṣarā.*

The point will be clear if the tenor of the discussion is briefly stated. Of the several modes in which servitude may arise there are two, *viz.*, by a person surrendering *voluntarily* his liberty, even as a woman does when she marries, or forfeiting it by doing something which is forbidden. There is further the general rule, which is stated in several smṛtis, that a Brāhmaṇa cannot be made a slave. Thus Kātyāyana[1] lays down:—

Triṣuvarṇeṣu vijneyam dāsyam viprasya na kvacit.

The *pūrvārdha* refers to the assumption of slavery voluntarily, like a wife, by giving away one's liberty (svatantrasyātmano dānāddāsatavam dāravatmatam).

Kātyāyana also says:—

Brāhmaṇasya hi dāsattvāt nṛpatejo vihanyate.

(By the slavery of a Brahman the lustre of the King is lost.)[2]

A person who renounces the ascetic life (*pravrajyāvasitaḥ*) becomes, according to Yājnavalkya the life-long slave of the King.[3] The same rule is given by Nārada in specifying the person whose slave a person abandoning the ascetic order becomes:—

Rājno hi dāsassyāt pravrajyāvasito narah.

'He becomes the slave of the King. He cannot be emancipated (*na tasya mokṣosti*) being a slave for life'.[4]

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1. Kane, *Kātyāyanasmṛtisāroddhāra*, 1933, verse 715.
2. *Ibid*, verse 717.
3. *See* II, 183:

   Pravrajyāvasito rājno dāsa āmaraṇāntikam.

4. Ed. Jolly, *Bibliotheca Indica*, 1886, p. 148:

   Rājnām evatu dāsassyāt pravrajāvasito naraḥ,
   Na tasya vipramokṣosti na viśuddhiḥ kathancana.

The rule implies that a Brāhmaṇa *can* be the slave of a king, who might belong normally to the *kṣatriya* caste and who *can* be of even a lower caste. If such a degradation of status of a Brāhmaṇa occurs, it would be opposed to another rule of law that the relation of master and slave can exist only between those of equal caste (*varṇa*) or in the order of the castes (*anulomataḥ*), the master being of the higher and the slave of the lower caste. The reverse order in prohibited:

Varṇānamānulomyena dāsyam; na pratilomataḥ.[1]

The prohibition of *pratiloma* in the relation of master and slave is repeated by Nārada, who states as the *only* exceptions to the rule that those who abandon their *āśrama-dharma* (the persons who renounce asceticism for example) *can* have a *pratiloma* relationship:

Varṇānām prātilomyena dāsatvam na vidhiyate.
Svadharmatyāgino anyatra.[2]

Vijnaneśvara in commenting on the passage in Yājnavalkya prohibiting *pratiloma* relationship between slave and master cites the above rule of Nārada to show that a *pratiloma* relation *can* exist between master and slave, as when a king becomes the owner of a slave, who had forfeited his liberty by abandoning his *dharma* as an ascetic:[3]

"Svadharmatyāginaḥ punaḥ parivrājakasya prātilomyena dāsatvam iṣyata eve."

Accordingly, Vijnaneśvara's view is that a Brāhmana ascetic, who renounces his *Sanyāsa*, becomes for life the slave of one inferior to him in caste. But, the passage in the *Kalpataru*, which is brought up as containing a reference to Vijnaneśvara's view, definitely ascribes to him, as his characteristic opinion (*svarasaḥ*), the conclusion that the rule for Kṣatriyas, Vaiśyas and Śūdras is that they *cannot* put a Brāhmaṇa in the position of a slave to do a slave's work.[4]

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1. *Yājnavalkyasmṛti*. II, 189.
2. *Nāradasmṛti*, V, 39.
3. Comment on Yājnavalkya, II, 183.
4. Kṣatra-viṭ-śūdra-dharmastu brāhmaṇaḥ brāhmaṇam dāsakarmaṇi na kārayet iti Vijnāneśvara-svarasaḥ.
(*Vyavahara-Kalpataru*, (Folio 380 of Sarasvatibhavan Transcript).

If Lakṣmīdhara desired to refer to a writer, he would obviously not have done so by attributing to him the exact *opposite* of the views to which he had given public expression, in a book which must be available to every one. This is just what he must be deemed to have done, if we accept the view that the passage cited above is authentic and contains Lakṣmīdhara's citation of Vijnāneśvara's opinion on the controverted point. The view embodied in the passage is that of Lakṣmīdhara and not that of Vijnāneśvara. Caṇḍeśvara was therefore right in citing the conclusion embodied in the above *vyavasthā* (opinion) as Lakṣmīdhara's. Its attribution to Vijnāneśvara will only show that he who made it had not read the *Mitākṣarā*. It may be noted as a justification for Caṇḍeśvara's citing the passage as Lakṣmīdhara's special view that, in the selection of authorities from *smṛti* to decide the question whether under any or particular circumstances a member of the first caste (*prathama-varṇa*) can be enslaved, Lakṣmīdhara deliberately refrained from citing *Yājnavalkyasmṛti* and coupling it, as done by the *Mitākṣarā*, with the amplification by *Naradasmṛti*, and that authorities are brought in to support his thesis that under *no* circumstances can a Brāhmaṇa be brought to a servile status. His view is in harmony with that of *Viṣṇusmṛti*[1] which imposes the highest amercement for violence (*uttama-sāhasa-daṇḍa*) for the offence of reducing to servitude a Brāhmaṇa and that of Kātyāyana and Bṛhaspati.

It is thus clear that the reference to Vijnāneśvara in the *Kalpataru* is not authentic. Both this sentence and the one bringing in an alleged quotation from Bṛhaspati are manifestly the interpolations of some reader, who noted them in his copy of the *Kalpataru*, and when the manuscript was copied, the scribe, as scribes still do, embodied the marginal note of the reader in the text, as if it was part and parcel of the text.[2]

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1. *Viṣṇusmṛti*, V, 151 Ed. Jolly.

2. This is technically known as 'reader's conflation'. *Conflation* is the appearance in a manuscript of readings which are neither derived from the archetype (by continuous descent), nor are original variants of its own or of any of its ancestors, but have been imported. The type of interpolation now noticed in the *Kalpataru* will be termed also as "contamination" by some critics. (W. W. Greg, *The Calculus of Variants*, Oxford, 1927, p. 56).

Even apart from the drift of this line of evidence, the balance of probabilities is against Lakṣmīdhara making any open allusion to Vijñāneśvara, even if it be conceded that, owing to the assumed chronological relationship between the two writers, such a reference was possible. The position of the two writers precludes such acknowledgment. Lakṣmīdhara was, for instance, the chief minister of the powerful king of Kanauj, who was extending his dominions and adding to them, so as to come within striking distance of the dominions of the Cālukya ruler, Vikramāditya VI, whom Vijñāneśvara glorifies.[1] The fourth and sixth verses in the conclusion of the *Mitākṣara*, which are indubitably by Vijñāneśvara himself, makes these claims:—"There is and there will never be on the earth, a city equal to Kalyāṇa (Vikramāditya's capital). No king who could be compared to Vikramārka has ever been seen or heard of. The learned Vijñāneśvara cannot submit to be compared to the slightest extent with a rival. May these three, who are comparable to the *Kalpavṛikṣa* (the immortal wish-yielding tree), last (live) till the end of the present cycle of time (*kalpa*) ......From the causeway of the ornament of the race of Raghu, which is massed fame (*i. e.*, Rāma's Bridge") to the monarch of the mountains (*i. e.*, the Himālayas), and from the western ocean, whose waves are raised by the gambols of shoals of fishes, to the eastern ocean (*i. e.*, from the Indian Ocean to the Bay of Bengal), may Vikramādityadeva, whose feet are resplendant from the lustre of the gems on the diadems of prostrat-

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1. A copper-plate grant dated Vikrama-samvat, 1177 (*i.e.* A. D., 1120) now in the possession of the Asiatic Society in Calcutta, mentions that Govindacandra sanctioned the transfer of the village of Karaṇḍa and the *talla* of Karaṇḍa in the *pattalā* of Antarāla, which was originally granted by Yasaḥkarṇa, from the possession of Bhaṭṭāraka Rudraśiva, a royal chaplain, into that of the Ṭhakkura Vasiṣṭha. Yasaḥkarṇa is obviously the Cedi ruler who was the son and successor of the more famous conqueror Karṇa of the Kalacūri dynasty, whose reign must have come to an end before A. D. 1080 as in the Candrāvati copper-plate of King Candradeva of Kanauj it is stated thus: "When Bhoja went to Heaven, and when Karṇa remained only in renown, and when the earth was being troubled, she found a refuge and a protection in Candradeva Gāhadvāla" (*Ind. Ant.*, XIV, p. 103). From A. D. 1117 the title "aśvapati-gajapati-narapati-rājyatrayādhipati" appears in the grants of Govindacandra of Kanauj, (*Ind. Ant.*, XVIII, pp. 19—20) and is continued in the descriptions of his successors. Later on the same title is taken by the Cedi ruler Narsimhavarman (c. 1155 A. D.). It has been suggested that the rulers of the Andhra country were the Narapatis. (C. V. Vaidya, *History of Medieval India*, II, 1926, p. 191).

ing kings, protect the entire world so long as the Moon and the Stars endure."[1]

The panegyric is as usual couched in somewhat exaggerated terms, but the skill of the author is shown in bringing into it innuendoes and references to facts or claims which a contemporary would readily detect. Thus, the words referring to the western ocean, as one of the limits of Vikramāditya's dominion, contain a concealed reference to his great contemporary and enemy, *Kulottunga Cola,* which has not till now caught the attention of scholars. The words "catulatimi-*Kulottungaringattarangāt*" which qualify in the more obvious sense ' the western ocean with waves raised by the gambols of shoals of giant fishes', may be taken as qualifying 'the eastern ocean' in the concealed sense of the "the unsteady movements of the struggling whale of a *Kulottunga*". The spiteful statement may have been put in for the special delectation of Vikramāditya, even as even more spiteful allusions to Kulottunga, under a corrupt form of his earlier title, Rājendra, [2](Rājiga) occur frequently in the poem (*Vikramānkadevacarita*) in which Bilhaṇa lauded the life and achievements of Vikramāditya VI. Bilhaṇa refers to Kulottunga specifically as "the family foe" of Vikramāditya. The careers of the two kings should have, by their remarkable parallelism, intensified the bitterness of their rivalry. Both came to their imperial heritage by what Bilhaṇa calls "the concurrence of fortune," at

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1. Nāsidasti bhaviṣyati kṣititale Kalyāṇa-kalpam puram:

No dṛṣṭaḥ śruta eva vā kṣitipatiḥ Śrī-Vikramārkopamaḥ,
Vijñāneśvara-paṇḍito na bhajate kiñjānyadanyopamāḥ,
Ākalpam sthiramastu Kalpalatikā-kalpam tadetattrayam,
Āsetoḥ kīrtiraśe Raghukulatilakasyā ca Śailādhirājāt,

Ā ca pratyak-payodheścatula-timi-Kulottunga-ringat-tarangāt,
Ā ca prācī-samudrāt amita-nṛpaśiroratnabhā-bhasurānghriḥ,
Payād-ācandratāram jagad-itam-akhilam Vikramāditya-devaḥ.

2. Canto VI, ślokas 26 and 27:

Atha katiṣucideva daivayogāt parigaḷiteṣu dineṣu Coḷasūnoh,
Śriyamaharata Rājigābhidhanaḥ prakṛti-virodha-hatasya
Cengināthaḥ,
Kuṭilamatirasa asau viśaṃkamānah punar-amumeva parābhava-
pragalbham,
Praguṇamapakṛta pṛṣṭa-kopahetoḥ prakṛti-virodhinamasya
Somadevam.

almost the threshold of middle age. Both ruled for half-a-century. The Vengi country, forming the area between the mouths or deltas of the Krshnā and Gōdavarī rivers, was one of the bones of contention. The tract was originally a part of the Cālukya empire in the seventh century, and became independent under a younger branch of the original Cālukya line (the "Eastern" Cālukyas). Vikramāditya belonged to the later Cālukya line, whose kinship with the older line was hypothetical, while Kulottunga was by descent a scion of both the older Cālukya line (through the Eastern Cālukyas of Vengi) and of the Colas. Before he became the Cola emperor in 1070, he had fought, in A. D. 1067, Vikramāditya, who was then the favourite of his father Someśvara I, the founder of Kalyāṇa, and obtained from his admirers the title *Virudarāja-bhayaṃkara*, 'the terror of Virudarāja or Vikramāditya'.[1] The Cālukya had almost recovered Vengi, when the news of his father's death and the accession of his elder brother and enemy, Someśvara II made him withdraw (A.D. 1069). Vikramāditya had married a Cola princess, the daughter of the emperor Vīrarājendra I, and so had a shadowy claim to the Cola heritage. Six years after the accession of Kulottunga to the Cola throne war broke out again between him and Vikramāditya, who was to seize the Cālukya throne (A.D. 1076) on the defeat of his brother by Kulottunga, who had meanwhile turned the tables on his rival, conquered Konkan and the Mysore country, and reached the western sea. Kulottunga was however unable to push his advantages far, owing to the revolt of Ceylon and the invasion of Vengi by Yaśaḥ-Karṇadeva, the Haihaya king.[2] By A.D. 1076 Kulottunga had reconquered Vengi and appointed a son as viceroy over the tract.[3] He began campaigns against Kalinga, on the northern frontier of Vengi, in A.D. 1096 and a more famous invasion of Kalinga in A. D. 1110, which his general Karuṇākara over-ran.[4] In A.D. 1115 his dominions reached their

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1. *Kaliṅgattupparaṇi*, X, 25, referring to the war of 1067 states that it was in this war that Kulottunga earned the title of 'Terror to Virudurāja or Vikramāditya' (*Virudurāja-bhayaṃkara*). *See* Nīlakaṇṭha Śāstri, *Colas*, II, 1937, p. 5.

2. *Ibid.*, pp. 8—14.

3. *Ibid.*, p. 31.

4. *Ibid.*, pp. 33—38.

maximum extension, and virtually embraced the entire area of the present Madras Presidency.[1] By A.D. 1116 the tide turned against Kulottunga. The Mysore territory was lost by that year.[2] By 1118 Vikramāditya had reconquered almost the whole of Vengi,[3] and his territory had then *really* extended from the Western to the Eastern ocean, as stated in the panegyric of Vijn̲āneśvara, quoted above. The diplomatic activity of Vikramāditya was aimed at embarrassing his rival, by instigating enemies and rebellious feudatories. The Pāṇḍya revolt, the Ceylon rebellion and the troubles in Vengi and Kalinga, as well as in the Kannada country, were all fomented by him.[4] The wish that Vikramāditya should continue to rule from Rameswaram to the Himalayas, expressed in Vijn̲āneśvara's panegyrical verse, should be construed as a reflection of these alliances and the extension of the sphere of his influence to the dominions of the Cola emperor. If the description of Vikramāditya's sovereignty as extending from ocean to ocean, and from Rāma's Bridge, is realistic and not an empty vaunt it can only refer to a period *after* 1118 towards the end of the reign of Vikramāditya, who died in A.D. 1127. The prayer for stability (*ākalpam sthiram astu*) which Vijn̲āneśvara has uttered must have reference to the varying fortunes of the conquered areas, just as the reference to the struggles of "the whale Kulottunga" is an allusion to his last war against his rival.

Considered in this way, the date of the *Mitākṣarā* must be about A.D. 1120, *i.e.*, twenty years later than the *latest* limit assigned by Mr. Kane to its composition.[5] A considerable part of the Digest of Lakṣmīdhara must, on the data given below, have been composed *before* this date. That is to say, the Digest should have been written *early* in the reign of Govindacandra, while the commentary (*i.e.*, the *Mitākṣara*) should have been composed towards the end of the long

1. *Ibid.*, pp. 38—39.
2. *Ibid.*, pp. 41—44.
3. *Ibid.*, p. 44 to p. 47. "That Vikramāditya's rule did extend in this period to the whole of the Telugu country becomes clear from the provenance of his inscriptions."
4. *Ibid.*, Ch. XIII (pp. 1-60) *passim*.
5. "The *Mitākṣarā* was composed between 1070—1100 A.D." (*History of Dharmaśāstra*, p. 290.)

reign of Vikramāditya. This is borne out by the tenor of Vijnāneśvara's panegyric which seems to refer to what has been accomplished rather than to glories to come.[1]

To turn to the wish that that the Ćalukya king should rule *from the Himalayas* to Rameswaram, we must treat it as a pious aspiration if we remember the rapid expansion of the power and dominions of the Gāhadwāla dynasty of Kanauj in spite of the ever present fear of Musulman invasion and conquest.[2] In the Rāhan plate of A.D. 1109, the Yuvarāja Govindacandra records that he had *"again and again* by the play of his matchless valour" compelled the Amir (*Hammīra*) "to lay aside his enmity." (Hammīram nyastavairam muhur-asamaraṇa-krīdayā yo vidhatte).[3] Before 1126 he had annexed parts of Magadha.[4] In 1120 he had changed a gift of a village by the Cedi king Yasaḥkarṇa,[5] and a prince of the line claims in A.D. 1114 to have been honoured for his valour by the king of Kanauj. Govindacandra's victory in Dasārṇa on the day of the birth of his grandson Jayacandra is said to have been the reason for giving his name to the latter.[6] The Gagaha plate (now in the British Museum) of A.D. 1142 describes Govindacandra as having captured the elephants of "nine

1. The panegyric begins with the words "there never was, is or never will be" (nāsidasti bhaviṣyati kṣititale).

2. The fear of the Muhammadan was responsible for the permanent addition of a new tax, named *Turuṣka daṇḍa*, a Turk-geld, to the financial imposts of the Kanauj kingdom. It makes its appearance among extant epigraphs in the Rāhan copper-plate grant of Madanapāla and Govindacandra, dated A.D. 1109, and continues to the end of the reign of Jayacandra, who was conquered and killed by the Muhammadans in A.D. 1194.

3. For the Rāhan plate *see Ind. Ant.* XVIII, pp. 14—19. It is reprinted fully in Vaidya's *History of Medieval India*, II, pp. 479—480.

4. The Maner copper-plate inscription of A.D. 1126 records the grant of a village near Patna by Govindacandra.

It is published in the *Journal* of the Bihar and Orissa Research Society, II (1916), pp. 441—447.

5. *See ante* p. 214 and J. A. S. B., XXXI, p. 124.

6. *See* the Ratnapur inscription of Jājalladeva dated in the Cedi year 866 or 1114 A. D. It declares that Jājalladeva, who was descended from an earlier king of the same line as the famous Cedi rulers Gāngeyadeva, Karṇa and Yasahkarṇa, "on account of his prowess was like a friend honoured with fortune" by the king of Kānyakubja, *i.e.* Govindacandra who was then reigning.

kings".[1] He had apparently no powerful rival in North India, and the only rulers whose power could match his were Kulottunga, whose armies marched to the limits of North Kalinga, and Vikramāditya VI. His relations with these two kings seem to have been dictated by the Hindu politicial principle that a neighbour, whose frontiers march with one's own, is an enemy (*ari*), actual or potential, while the neighbour's neighbour on the opposed side is his ally (*mitra*), actual or potential, while that ruler's neighbour on the other side is the potential ally of his enemy (*arermitra*).[2] Thus, to Govindacandra, the 'enemy' will be Vikramāditya, and 'ally' Kulottunga, while to Vikramāditya, the natural allies will be those opposed to Kulottunga, like Vijayabāhu, the king of Ceylon, who reconquered Pollannārua (A.D. 1076) and freed Ceylon from Cola rule,[3] the kings of the Hoysāla dynasty[4] and the kings of Kalinga.[5] The influence of the principle on the relations of the three great contemporaries is evidenced by history. Vijayabāhu of Ceylon is said to have married Līlāvati, the daughter of 'Jagatipāla' of Kanauj. The queen of Jagatipāla is said to have been an internee in the Cola kingdom, from which she escaped with her daughter to Ceylon. We do not know when this marriage took place, but it must have been in the reign of Vijayabāhu, which extended from c. A.D., 1060 to 1120 practically covering the reigns of Kulottunga and Vikramāditya, and probably after he had freed Ceylon from the Cola supremacy.[6] The dynastic lists of Kanauj, either of the Pratihāra dynasty or of the Rāṣṭrakūṭa branch, which apparently had possession of Kanauj till c. 1085, when it was seized by Candradeva of the Gāhadvāla dynasty, the grandfather of Govindacandra, do not contain the name Jagatīpala. He was probably an obscure person with pretensions to Pratihāra or Rāṣṭrakūṭa lineage. The flight of the distressed 'queen of Kanauj' with her daughter

1. For the Gagaha plate *see*, *Epigraphia Indica*, XIII, pp. 216—220 and *Ind. Ant.* XVIII, pp. 20—21. The victory over the "nine kings" is mentioned in earlier epigraphs of the king, and the earliest extant reference A. D. is in the Pali plate of 114. (J. B. O. R. S., 1930. pp. 233-238. It reads *Nava-rājya* instead of *Nava-rāja*.

2. *See Sarga* VIII of Kāmandāka's *Nītisāra*, *ślokas* 16 to 50 (pp. 105 to 114 of the Trivandram Edn. 1912).

3. Nīlakanṭha Śāstri, *Colas*, II, p. 17.

4. *Ibid.*, pp. 41—44.

5. *Ibid.*, pp. 34—38.

6. *Ibid.*, p. 17.

must have been after Candradeva's conquest and after she had lost all hope.[1] Why did the fugitives escape from the kingdom of Kulottunga in which they were seeking an asylum? The answer is suggested by the intimate and friendly relations between Govindacandra and Kulottunga of which evidence exists in a stone epigraph (incomplete or mutilated in some rebuilding operation) of the sovereign of Kanauj, bearing a Cola date corresponding to A. D. 1110 which exists on the walls of a temple in the Cola capital Gangaikoṇḍacolapuram.[2] This inscription gives the familiar Gāhadvāla *praśāsti*, and ends (before mutilation commences) with the name of Candradeva, the grandfather of Govindacandra, to whose reign the inscription clearly belongs. The late Mr. V. Venkayya suggested that the inscription was perhaps incised during a friendly visit of the Kanauj king to Kulottunga. This is improbable. It is more likely that the endowment recorded in this inscription was intended as a gesture of friendship, and was allowed, with the *praśasti* of a reigning *foreign* ruler to be put up in the very capital of the Cola emperor. It is natural that this alliance between Kulottunga and Govindacandra should shut the Cola dominions to any pretender to the lordship of Kanauj. It will account for the flight of the mother of Līlāvati to Lankā, and Līlāvati's own marriage to the king of Lankā who had driven the Colas out of the island. The intense illwill between Vikramāditya and Kulottunga is evidenced both by contemporary literature (*e. g.*, *Vikramānkadevacarita* and the colophon to the *Mitākṣarā*,) and inscriptions[3]. Govindacandra's diplomatic activities naturally extended to all possible enemies of Vikramāditya VI. Thus, he is said in the *Prabandhacintāmaṇi* to have received an envoy from the Cālukya ruler of Aṇhilvād (Gujarat), the warlike Siddharāja Jayasimha (A. D. 1093 to 1143) the predecessor of the more famous Kumārapāla (A. D. 1143-1172).[4] In an Indian kingdom the responsibility for making alliances rests

1. Tripāṭhi, *History of Kanauj*, 1937, pp. 288—290.

2. Para 56 of the Annual Report of the Madras Assistant Superintendent for Epigraphy. for 1907—1908.

3. *See* Inscription No. 401 of 1896, Madras Epigraphist's Collection, where 'Vikkalan', *i.e* Vikramāditya VI and Singaṇan *i.e.* the Kadamba King Jayasimha, the ally of Vikramāditya. are said to have plunged into the 'western sea' on their route in battle by Kulottunga c. A. D. 1076.

4. The *Prabandhacintāmaṇi*., Ed., Jinavijayamuni, III, 121, states that Siddharāja Jayasimha sent an envoy to the king of Kāśi.

with the *Mahāsāndhivigrahika* or Chief Minister for War and Peace.[1] This was the office held in the kingdom of Kanauj, by both Bhaṭṭa Lakṣmīdhara and by his father Bhaṭṭa Hṛdayadhara and is signified by the term *Mantri*, which occurs at the head, of an enumeration of the officers of state to whom the Kamauli grants of Govindacandra were addressed for execution. In the eighth śloka introducing his work, Lakṣmīdhara describes himself as *"Mantrīśvaraḥ"*. This should be treated as a *paryāya* for the official title of *Mahāsāndhivigrahika*, which appears over and over again in the colophons. In two places, *viz.*, at the beginning of the first *kāṇḍa* and at the beinning of the *Rājadharma-kāṇḍa*, Lakṣmīdhara proclaims that it was *solely* through *his* counsel that king Govindacandra attained supremacy over other kings, and trod the path of righteousness, and made many crowned heads humble themselves at the feet of this king. Such an open declaration in a work written by command of a powerful ruler could not have been made unless the truth underlying it was well-known. The Cola alliance, of which we have evidence, soon after the formal assumption of sovereignty of Govindacandra about A. D. 1110 may have been due to his Minister's skill, and intended to check the designs of the aged and warlike ruler of the Dakhan. It is noteworthy that in the description of the prowess of his king, in the introductory stanza, Lakṣmīdhara refers only to two exploits specifically, *viz.*, repeated defeats of the *Hammīra, i.e.*, the Muhammadan invader, and the humbling of the Gauḍa ruler. The first exploit occur-

1. The pompous title does not appear in the Gāhadvāl inscriptions, where the *Mantri* is mentioned, immediately after the queen and yuvarāja, among those commanded to give effect to the grantee's wishes. The title of *Mahāsāndhivigrahika* describes an important duty of the Chief Minister (*Mantri*). It occurs in Rāṣṭrakūṭa records, where the functionary is usually entrusted with the duty of drawing up the copper-plate grants recording gifts or alienations. This duty is assigned to this officer in an anonymous text quoted in the *Mitākṣarā*, on Yajnavalkya, I, 319—320:

"The drafter (of the copper-plate) should be the *Sandhivigrahika-kari*. He should draft the charter as dictated by the king himself."

Apparently the responsibility for accurately expressing the king's commands could not be entrusted to any lower person than the Chief Minister, responsible for the policy of the kingdom. The philosophical reflections on the transitoriness of life and the enduring nature of charity, which occur in some of the Gāhadvāla inscriptions must be deemed to represent the very words of the donors (*e. g.* Candradeva's Candravati plate of 1093, and Madanapāla-Govindacandra plate of 1099). *See* A. S. Altekar, *Rāṣṭrakūṭas and their Times*, 1934, p. 166.

red only during the reign of Madanapāla, when as Yuvarāja Govindacandra was virtual ruler.

The second exploit, *i.e.*, the humbling the Gauḍa, must refer to some attack, of which we have found no record as yet that occurred early in the reign, on Madanapāla of the Pāla dynasty of Bengal, who had sought the alliance of Candradeva, Govindacandra's grandfather, when attacked the Sena king Vijayasena. It cannot refer to the later conquest of Pāla territory as far as Monghyr, since in the Rāhan plate of A.D. 1109 Govindacandra is already described as "terrific in cleaving the frontal lobes of arrays of irresistible mighty elephants from Gauḍa." The same inscription records that he "again and again by the play of his matchless fighting compelled the Hammīra to lay aside his enmity," in language recalling Lakṣmīdhara's *praśasti* of Govindacandra:

Asama-samara-samyak-champataśśaurya-bhājām
Avadhiravadhiyuddhe yena Hammīravīraḥ

The omission to refer to the later conquests in Daśārṇa and Magadha and to the victory over the 'nine kings' (*nava-rāja*) and to Govindacandra's later title—*aśvapati, gajapati, narapati, rājyatrayādhipati vividha-vidyā-vicāra-vācaspati* (these could not be missed by a Minister who composes an euology on his Sovereign)—makes it clear that his vague references, other than these two specific claims adduced on his behalf to Govindacandra's military exploits, must have been due to Lākṣmīdhara having written early in the reign before those conquests were made and the *virudas* acquired.[1] There

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1. The *viruda* "aśvapati-gajyapati-narapati rājyatryādhipati vividha-vidya-vicāra-vācaspatiḥ" appears first, in the extant inscriptions in a grant dated A.D. 1117 (*Ind. Ant.* XVIII, pp. 19—20), and the reference to the exploit of capturing the elephants of nine kings first appears in an inscription of A.D. 1114 (the copper-plate, Pali, J. B. O. R. S., 1930, pp. 233-238) but it has been translated as referring to the new kingdom (*Navarājya-gaja*) personified as an elephant, instead of being taken as referring to the elephants of nine kings (*Navarajagajo narendraḥ*). The full sentence is:

Tasmād ajāyata nijāyata-bāhuvalli-baddhāvaruddha-nava-raja-gajo-narendraḥ.
Sāndramṛtadravamucām prabhavao gavām yo Govindacandra iti candra-ivāmburaśeḥ,

As this *śloka* is repeated in subsequent grants, as an official *praśasti*, and as when it first appears Govindacandra must have been ruler for atleast ten years, the description of him (under this verse) of having by his powerful

is no violence to probability in such a view, because Govindacandra had been virtual ruler for a dozen years before his formal accession, and even as Yuvarāja must have attained manhood.[1] As Lakṣmīdhara's father was also a Minister before him, it is not unlikely that father and son, served Govindacandra's father and Govindacandra himself, and that they had been commissioned for the composition of the *Kalpataru* even before the formal beginning of the reign of Govindacandra, who is pointedly praised by Lakṣmīdhara for his self-mastery, and learning.[2] The inscriptions show that Govindacandra's predecessors were devoted to Hinduism.[3]

To sum up. Any possibility of Lakṣmīdhara's making a reference to Vijñāneśvara is ruled out on two grounds mainly, viz.: (1) the dictates of prudence, because no sensible Minister will cite as an authority an adherant of his king's rival or enemy; and (2) the impossibility of an earlier work quoting a later. For, it follows from the data already adduced that the *Kalpataru*, should have been composed about A.D. 1110, early in the reign of Govindacandra, while the *Mitākṣara* could not have been completed before A.D. 1120. In any case, the *Mitākṣarā*, even if it had been composed a few years before the *Kalpataru*, could not have assumed sufficient importance in the eye of so proud a scholar as Lakṣmīdhara, who has described his many claims as a *nibandha*-writer, as to make him rank it as an authority with Gopāla's *Kāmadhenu*, *Pārijata*, *Prakāśa*, *Mahārṇava*, Halāyudha, and *Mālā*, referred to either in the introductory verses or cited in the body of the

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arms bound and controlled the elephant (which was) the *new* kingdom, is pointless.

1. Grants of A.D. 1114 refer to the Yuvarāja among those asked to implement them. A Yuvaraja must be atleast sixteen years of age. As Govindacandra was Yuvaraja as early as atleast 1099 when in a grant issued by him in the life-time of his father, he omits to mention the Yuvaraja (*i.e.*, himself) among those commanded to give effect to the grant, he should have been at least thirty years of age in 1110. His latest extant inscription is dated A. D. 1154, when on this supposition he must have been seventy-four, not an improbable age considering what his contemporaries Vikramaditya, Kulottunga and others attained.

2. It is expressly stated in some of the colophons to the *Kalpataru* that Hṛdayadhara, the father of Lakṣmīdhara was also *Mahāsāndhivigrahika*.

3. This is evident from the pious allocutions in some of their inscriptions, and from the claim of Candradeva that he was the protector of the holy places of Kāśi, Kuśika, Uttarakosala, and Indrasthāniya, as well as from the general tenor of their rule.

Kalpataru.[1] The alleged citation of Vijnāneśvara by Lakṣmīdhara has accordingly to be rejected.

In an examination of the *Vyavaharakāṇḍa* three instances have come to light in which the interpretation of certain *smṛti* verses is in almost the same words in both the *Mitākṣarā* and the *Kalpataru*. The verbal identity may be accidental, as the verses are not difficult, or the commentary may have been copied from an earlier writer by both authors. Ingenuity may see in the prayer of Vijnāneśvara that his work, his city and king should last as long as the *Kalpalata*, a concealed compliment to the *Kalpataru*.[2] Such a surmise will not be ruled out as improbable if both writers had been attached to the court of the same ruler. The circumstance that their allegiance was divided, between two powerful and passively hostile kings, makes the suggestion untenable. But, whether the two writers knew each other or not[3], it is a mark of the powerful wave of Hindu feeling, which was stimulated by the Muhammadan attacks and the rise of new states, that such cardinal works as those of Lakṣmīdhara, Vijnāneśvara and Aparārka should have been produced in the same generation.

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1. Lakṣmīdhara is critical of the predecessors whom he names. He claims that after the composition of the *Kalpataru* the splendour of the *Mahārṇava* was lost. The *Kamadhenu* had to slumber at the foot of the *Kalpataru*, and inferior works like the *Māla* need not be counted at all among those that would be treated with regard after his own composition came out. The claims are urged in these two verses:

> Yasyotthitau sthitamatī na Mahārṇava-śrīḥ,
> Nidrām dadhāti yadadhah khila Kāmadhenuḥ,
> Tasyātaniṣyati ratim vibudhadvijānām,
> Ananditum kimu na Kalapataroḥ prarohah,
> Ka cintaiva Mahārnavānusaraṇe ka Kāmadhenuspṛhā,
> Kṣudrāh kasya parisphuranti hṛdaye te (Ratna) Māladayah.
> Śri-Lakṣmīdhara-buddhi-vaibhava-sudhā-seka prabhāvadayam
> Yenātraiva jagattrayopakṛtaye Kalpadrumaḥ kalpatae.

2. *Cf.* Akalpamsthiramastu Kalpalatikā-kalpam etattrayam.

3. Govindacandra is referred to, not only by Musulman writers, but by Lakṣmīdhara himself as the Ruler of Kāśi (Benares). Many of his grants were made there after bathing at one or other of its holy tīrthas. Lakṣmīdhara must have himself resided there, and been a well-known figure. If, as is probable, Vijnaneśvara made the routine pilgrimage to Kāsi, the two must have met, though it might have been after their respective works were composed.

RE-CONSTRUCTION OF HINDU LAW

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There are many branches of Hindu Law that require reform—particularly, inheritance, succession, marriage, and women's rights to property. The Smritis came into existence when the Hindu society was compact, simple, and comparatively primitive, and when the texture of its fabric was not so multi-coloured as now and the threads and cross-threads were not so numerous. External and internal forces have been operating through centuries in the direction of the gradual transformation of Hindu society in several respects and in bringing into existence new ideas and ideals, animating and governing daily conduct and life. Changes have been wrought in men's outlook as much by the impact of other civilisations as by the indigenous growth of thought in the march of progress. Ancient standards of life are vanishing before our very eyes and new rules of conduct as between individuals *inter se* and between the individual and the society or the state are regulating in increasing measure our mutual relations, rights and duties. The joint family system, with its background of corporate effort and selfless endeavour, has almost crumbled, yielding place to individualistic ideas of property and limitation of families. Marriage is ceasing to be regarded as a sacrament and is increasingly associated with the notion of a contract, attracting the attendant consequences of divorce, judicial separation, etc. Women are insisting on equal rights with men in matters relating to education, franchise, property and

even office. The propriety of rules of succession and inheritance excluding nearer relations in favour of remoter ones on fanciful theories of religious efficacy or commingling of blood particles is doubted and challenged.

2. People who are interested in the true welfare of the Hindu society must take note of these trends and tendencies and changes in outlook, standards and aspirations, and try to reconstruct parts of it at least to suit the present environments, conditions and angles of vision. Those who would still cling with pathetic faith to the old order and refuse, with their conservative instincts and traditions, to examine the need for some reformation, actuated by the belief that everything pristine and ancient is so clothed with eternal wisdom that it is immutable, must be characterised as lacking in vision. Rules and laws that regulate society must be capable of change, and must change, according to fresh needs and conditions. Even the sages who wrote the *smritis* contemplated the possibility of such changes.

The question is how they are to be effected and what is the amount of caution that has to be displayed in the process? Any rashness in the introduction of reforms, especially in matters affecting the proper maintenance and progress along right lines of a huge society that has survived through countless ages with its essential vitality and life unimpaired, may endanger its very existence in subtle ways, undreamt of by the sponsors of particular measures of reform. Great care and deliberation is necessary, especially when the interference is in socio-religious fields. The present edifice is a marvellously strong construction, built patiently in the course of ages by selfless men who had nothing but the weal of the society and state at heart and who were pre-eminent for their foresight, intuition and selflessness. Even a slight attempt to pull out a piece here or a piece there may have unexpectedly disastrous consequences on the whole structure. Most of us, with our limited knowledge and experience, see only a few links or perhaps even parts of a link ; the

whole chain is probably invisible to our eyes of limited range.

3. In particular, reforms intended to bring about changes in the status of groups of men composing the society, and entrenching on questions of faith and religion must be thought out with the utmost care and caution and introduced without a jar or jolt.. Psychological moments must be chosen for the purpose ; the time must be propitious, the opportunity favourable and the true pulse of public opinion must beat in unison with the new idea. The law relating to marriage is another branch where the deepest circumspection is needed before changes are contemplated. The devising of a rational code of succession and inheritance, consistent with equity and justice and the ideas of propriety prevailing in the particular society, is another subject which presents difficult and thorny problems for solution.

4. Our modern legislatures do not appear to be well suited to the task of undertaking such reconstruction and reform. The party system of government is in vogue and men in power come into office on the strength of popular catchwords, phrases or slogans. To redeem their promises and pledges, they have to undertake reforms and carry them through in the teeth of opposition not only from their opponents in the council chambers but also in the country. Strength of numbers and votes often carry the day, and hasty legislation even in matters vitally affecting the very foundations of society is sometimes the result. Policies are decided on over-night and ill-drafted legislative measures, replete with omissions and pitfalls, are manufactured the next morning and rushed through the legislatures with a numerical strength to back them up. The hurry is sometimes so great that one feels whether the men in charge are not labouring under the delusion that the world was going to come to an end the day-after-to-morrow and that they must do something to save it by the time the cataclysm occurs. Ill-conceived, badly drafted and lop-sided enactments, rarely serving the pur-

pose for which they were intended and resulting in consequences fraught with evil and mischief to the society at large, are becoming increasingly common. The reformer who initiates a particular measure is often a one-idea man, if such a term can be used. He does not care to reflect, how the existing order of things is inter-related with the whole structure of society and how his reform will affect the rest. Where extraordinary patience, great foresight and wise thoughtfulness are necessary, our reformer-legislator rushes in, with his pet scheme for reconstruction and does not rest content till he adds his name to the roll of men who have added statutes to the book.

5. Reforms in the matter of laws and usages affecting whole societies and peoples must be undertaken after mature thought and reflection. It is a danger to ride on a single idea however attractive it may be for the moment; and the peril is greater when the rider is allowed to ride rough shod, taking no note of the possible consequences of his careering. In trying to do a little good, we may produce general harm; in remedying one evil, we may introduce in its place quite a number; in endeavouring to benefit one group or class, we may injure many other groups or classes; and after all even the intended good may not materialise. The famous words of Swami Vivekananda come uppermost to our minds in this connection. Every society has got a special genius or bent or tradition; build on the past if you want to build securely; do not destroy to reform.

6. Not merely matters relating to status, marriage, divorce and succession but also questions connected with faith and religion enter into the elements that go to make up and sustain a society. Any attempt to alter the structure by reformation, partial or wholesale, in such fields must be the result of a conjoint effort on the part of the wisest and most thoughtful men, who can take a proper perspective of the whole picture and see every detail in its proper setting; and before undertaking any such task their very wisdom and foresight will enable them to ascertain

if public opinion, not measured by the number of votes cast but by the weight of views of sober, learned and well-balanced men, having no political careers or ends in view but actuated by the highest motives of public good, is in favour of the reform. Hence when any such measures are introduced in the councils of our country, there must be insistence on their being circulated for public opinion, and on expert committees being constituted to sit and consider on the policy of the change or reform contemplated. After all this is over, and if the verdict is in favour of the change, the drafting of the Bill must be entrusted to the hands of true experts in the art. It is only if these precautions are observed that we can be safe from needless and reckless prejudicial changes ; due more to the zeal of the reformer than to his wisdom, if things are allowed to be done as they seem to be at present, we shall soon have our society in a state of chaotic disruption of which there are signs already.

STATE : ITS MODERN CONCEPTION

BY

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An American eye-witness's account of the persecutions in Germany under the National Socialist regime runs as follows :

"During the first week of July a new batch of prisoners was received, ranging in age from eighteen to sixty-five years. All of them, as they were lined up for registrations, showed that they were badly treated on the way to Camp. Some had their faces beaten to pulp, others had their teeth knocked out, their clothes torn from their bodies, all were covered with filth ...... One of them, a very short, stout man, asked for water, as he seemed about to faint. The guard, a very smart, educated young man, judging from his appearance, reached for a tin-cup in which he urinated; one other guard forced open the prisoner's mouth, and they poured the urine in his mouth."[1]

This is an instance of the normal happenings in the year 1933-34 in Germany. The new party in power under Adolf Hitler accorded this treatment to those individuals or groups whose expressed or implied attitude of mind threatened, differed from or sought to reform the existing system of National Socialist state. We hear a lot of criticism against the way in which the Nazi party crushed its opponents. The tenets of Nazi philosophy are supposed to be that ' there is no law and no good which transcends or can transcend national law and national good ' and again ' Tolerance, like humanitarianism, is not a virtue but a vice of weaklings. There is no loyalty except loyalty to Nazi Germany. The world outlook is embodied

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1. Nazism (Part I) 'Record of persecutions' by Dorothy Thompson pp. 16, 17.

in the Leader, who must be regarded, as long as he is a Leader, as infallible.' This deification of the leader who happens to be the head of the military forces of the state is what is deemed dangerous to-day to humanity in general and democracies in particular.

Now, turning to the events that happened in another part of the world ruled under constitutional democracy, we feel equally shocked at the severity that is reported to have marked the action of the state in its attempt to suppress opposition. A recent writer in India criticising the Government of India's action against the Civil Disobedience movement of the year 1930-31 writes:

"The England that stood up to protest against the persecution of the Jews, against the atrocities committed by Fascism on those who were less prepared for an armed conflict—that England would not have stood up for the brutality which was committed by Englishmen in India."[1]

He quotes an impartial English woman's evidence thus:

'She went to Dharasana, to see for herself what the police were doing to the Satyagrahi volunteers......The stripping naked of men before beating......The tearing of loin cloths and thrusting sticks into the anus. The pressing and squeezing of the testicles till the man became unconscious.'[2]

How these two accounts of state-persecution of its opponents would strike the student of political science may not be different from the impression a layman gets of the 'sheer vulgarity and indecency of assault' displayed in both. At any rate one is forced to believe that philosophical concepts of state apart, resort to actual force is made to suppress opposition whenever the state is faced with it seriously, be it a totalitarian or a democratic form of state. In the last analysis, we understand, the state is built upon the ability or capacity of its government to operate successfully its supreme coercive power. In order to compel obedience to its sovereign will, the armed forces are used by the state. It is no doubt true

1. Out of 'Dust' by D. F. Karaka (1940) pp. 216, 217.
2. *Ibid*, p. 217.

that when the members of a state are agreed about the purposes embodied in its policy, the coercive power may recede to the background. It is also conceivable that in a democracy governed by liberal principles like Britain, which generally offers critics of the government a fair chance of replacing it in power at the end of its term of office, the coercive element may not obtrude frequently. But even there at any critical moment, as during a war, the fact that it has authority to coerce opponents within, to crush their wills and to make them submit to its ordinances and emergency measures emerges as the central nature of the state. Indeed, in such situations, either the state will have to accept the challenge to law, or immediately change its course of action, and if it has no mind to alter its purposes, it must do so by making those of different minds yield to its force. Hence, Laski describes the conception of state thus :

> 'It is a power outside and above that of the people as a whole. It is in susperse so long as the will of government is unchallenged; it becomes operative immediately the effectiveness of that will is in danger.'[1]

This bringsout also the distinction between state and government. The latter is only the agent of the former ; it merely carries out the purposes of the state. It is not in itself the supreme coercive power. Its competence is defined by the state with such authority as it may choose to give it.[2] Further, there is difference between government of a state and government of any other association or body of individuals. The government of a state can always rely upon the armed forces for support unlike other governments which have to seek the sanction of the state, if they require such coercive power to be exercised. What Adolf Hitler did in June 1934 was only to purchase the army's support, wherein lay the heart of sovereignty.

The discussion about sovereignty and its attributes has engaged many philosophers in England and theorists

1. Harold J. Laski 'The State : Its Theory and Practice,' pp. 27, 28.
2. *Ibid* p. 23.

in Germany who believed in the legal and moral personality of the state. Any lengthy discourse will be out of place here. Suffice it to say, for our purpose, that all writers in all countries agree that sovereignty has to do with the law, the supremacy of the law, and the right of law-making or legislation vested in the state and exercised by the government. To define sovereignty one need not labour much, but adopt in a general way what Wilson in his book on 'The Elements of Modern Politics' has concisely sketched :

> "Human experience has shown in the evolution of political society the need, they say, for some source of decision which is final, which takes precedence over other decisions, and this capacity, being established in the state, is known as its sovereignty."[1]

The theory of sovereignty, in short, gives us the characteristics of law and of the state in regard to law. In democracies, it is admitted, public opinion is a controlling factor of law. But when theories of law are considered, they are found justifying always a social order in which the many lived for the benefit of the few. Perhaps a statement like this may appear as an extreme criticism of the origin and purpose of law. No doubt, the Greek view was that law cannot be binding upon men unless they consent to make it so. Again, in a cruder form, the theory of Social Contract advanced the thought that men agree to make a state and endow it with the power to issue orders. All such theories, in the first place, suffer from a grave defect that we have no evidence of an original consent or contract which such theories demand. Yet we know in actuality that the state has gradually grown into existence with its primary attributes of population, territory, government and sovereignty. While any system of legal imperatives is proportionately healthier or weaker in the degree that it involves a minimum or a maximum of coercion, no modern state could be thought of, whose aims would be secured without the exercise of force on some at least of its citizens. This exercise of force by the state can be justified only in terms of the benefits it seeks

1. Wilson : 'The Elements of Modern Politics' p. 66.

to confer on the subjects. The ideal state can only exist where its claim to obedience is founded on its capacity to respond to the social demand 'maximal in character,' since every state contains within itself a vast body of interests of individuals as well as groups, often competing with one another or co-operating.

So long as the ideal state seems an Utopia, the question remains when and how could the condition be accomplished for a state, free at least from internal troubles. There can be no single prescription for it or for all times. Let us first diagnose the disease that mars the normal progress or security in a state. Whenever a clash of political values between the state and its subjects arises, violence takes a prominent part in defeating law. It will be no satisfactory answer to say then that it is the duty of the dissentient minority to persuade others to rally to its view and itself become in course of time a majority. We can easily imagine the impossibility of any such constitutional method being adopted in any of the modern dictatorships of Europe. It is argued, sometimes, that the situation will be quite different in a constitutional democracy. No doubt, liberty to criticise the government exists in a country like Great Britain. Provision is made deliberately for those who differ from the government to make their voices felt, if only they could bring round a majority of their fellow citizens to their own way of thinking. But even for such a constitutional process two conditions, as set out by Laski, have to exist. Briefly, they are (1) the unbiassed operation of the state institutions and (2) the ability on the part of those who operate the government to presuppose the observation of principles of constitutional democracy by their opponents. Otherwise the sore point of difference will ever remain making it difficult for the minority to achieve its ends by mere persuasion.

Glancing at the history of nations, we find every state known to history has only acted through some persons, say, a body of men termed government. The control of legal relations in a society has always been in their hands.

The authority exercised by them has always been used to determine how the fruits of production shall be distributed among the members of the state. According to the leading political philosophers, there were many phases of this social relationship in the past, which had to do with the nature of the government ultimately. Karl Marx characterised it as class-struggle in every community between the divisions of labour and private ownership of production. His view was that the increase of capitalist industry, however beneficial, divided society into two hostile groups, a *bourgeois* which owned and jealously guarded the instruments of production by resorting to state-power, and the *proletariat* which depended for existence on its capacity to sell labour when required. This antagonism alone does not sum up all the class-struggles that exist in a given society or state. There may be other and more serious causes for class-struggle such as racial prejudice, which are no less significant in an analysis of social relationship. But the Russian Revolution of 1917 has struck thinkers deeply in the West to form a theory, that the antagonism between capital and labour, whenever the system of production prevents the working classes receiving the return to their efforts regarded as but due, breaks the structure of an existing society. Hence in the Soviet regime in Russia the legal relations between the classes have been fundamentally altered by making the state, instead of private individuals, the owner of the means of production. But even there the government rules by the sword. For Lenin the state is only an agent for the repression of the opposition. The Communist government with its Soviet system of representatives, is officially opposed to political democracy, though in reality, judged by the wide exercise of franchise, there may be more voters in the U. S. S. R., than in the United States of America. In this power of the state to attack those who denied that the state functioned in their interest or that the purposes of the government were adequate for their rightful enjoyment of the fruits of production, we trace the new order of

dictatorships. Experience, in recent times, has thrown much light upon the despotic nature of the state. Its coercive power, we find, has been utilised for protecting the stability of a given system of class-relations. Generally the government in the new dictatorships act as the executive committee of the class which dominates economically the existing system of production.

If we look at what the Fascist state does, we find much of its operation associated with force. Fascism does not stress the consent of the individual, but the submergence of the individual will in the will of the nation. It recognises obedience to and agreement with the state's policy. Uniformly, none of the dictatorships believes in the consent theory of state at all. The rejection of the consent theory implies the total abandonment of all the machinery that had been developed in the past for the free expression of consent. The one admitted advantage resulting from it, perhaps, at the expense of so many healthy principles of liberalism, is the creation of corporate efficiency of the state.

If we for a moment try to look into what this liberalism was and still is, we can put it as the faith in certain virtues—self-respect, self-reliance, tolerance, charity, justice, freedom and brotherhood. It has to keep out certain vices—race-prejudice, national pride, class-consciousness, intolerance, tyranny and violence. It seeks to establish such institutions of government as shall most quickly and endurably give men their full measure of individuality and free expression. The great success of liberalism has been in the field of politics, while in that of economics its failure has left men enslaved in poverty. The tragedy of liberalism, we may say, is due to its collapse under the barbarism of modern warfare. Strangely enough, idealism still goads people to hope for a free Commonwealth of Nations, where prosperity will be shared in by all, and none shall 'labour in vain, nor bring forth for calamity', but every one shall live and grow in the joy of free self-expression.

The rise of Hitler to power has sounded the doom to all these dreams. The crisis in liberalism has brought about the death of the League of Nations. The totalitarian state resting on a tribal union of racial feelings has gained enormous strength with the initial military successes. When the 100,000 Hitlerites gathered in convention at Eisenach, they declared their responsibility 'for one Germanic origin before the divine reality.' Is this not tribalism pure and simple? Should not liberalism save the situation? The answer is, liberalism has receded to the background with the birth of a keen class-struggle between those possessed and those dispossessed. If liberalism must live, it cannot be confined to any particular state or government. It lives, if at all, internationally as well as nationally. It implies the existence of free nations in a free world, whatever their level of culture. But usually in the zest of a democratic state to bring within its fold others less fortunate, imperialism takes shape. Imperialism is a form of violence which leads to open use of power, and it involves the denial of the fundamental principles of liberalism.

The chief feature of the technique of violence in the new dictatorships of Europe is the development of the single-party system. Liberalism has always depended on the two or multi-party system as the best means for achieving political and social progress. The single-party, while it controls or seeks to control the country, is constantly attempting to get support of the masses. But at the same time the membership of the party is limited to the faithful, whose willingness to follow to the last their leader remains unquestionable. The rank and file of the party are the pillars of the government and serve the need for stamping out opposition. In a way ultimately the modern dictatorships also rest upon the support of the masses. Rather, with the aid of the armed forces, the masses are intimidated into recognition of the one-party in the state.

The problem of mass support has been the final determining factor in all states known to us. It can

hardly be doubted that Aristotle, the father of political thought in the West, looked upon the character and distribution of wealth in a society as the chief determining factors in fixing up the form of the state. It is equally clear that he found the causes of revolutions in the competition between those who have much and those who have little or no property. His solution for the best life of the state is that of a city composed of middle classes, as, according to him, they are the natural elements of the state. He opined that the safest and the most enduring form of democracy would be that based on agriculture.

Among later writers Macchiavelli advised his "Prince" to maintain his power by taking into account the conflict of classes out of which political power springs. Locke was the precursor of the American and French Revolutions as well as the apologist for the English Revolution of 1688. James Madison in his powerful 'Defence of the American Constitution' describes the sentiments and views, which arise from the possession of different kinds of property, as forming the substance of the so-called 'political psychology'. So did another American writer, Webster, feel that the form of government (except where the sword rules) is determined by the nature of the distribution of property. Similarly John C. Calhoun of South Carolina found economic interests chiefly creating political parties, which ultimately mould the government.

The great fact stands out clearly after so much philosophical thinking, that through centuries down to the present times, group interests are the essence of politics, both in theory and practice. We know from the constitutional history of many nations, that constitutions were deliberately fitted to the division of society into separate orders, groups and estates, each of which pursued a separate calling and cherished its own sentiments about economic interests. It was the Industrial Revolution of the eighteenth century that ushered in the new form of property, *i.e.*, industrial wealth. The value of the newly found property exceeded the value of agricultural land.

There was at the same time a great revolution in political thought. Political equalitarianism preached by Rousseau began to do deadly work with the old order of governments. But political equality without economic equality became a shadow without substance, though universal suffrage was one of the good results of the equalitarian principle.

We know the democratic device of universal suffrage has not destroyed the economic classes or economic inequalities. Before the late war of 1914 nothing was more apparent than dissatisfaction with existing political institutions. Equally clear was the dissatisfaction felt about representative governments. With the Communist upheaval in 1917 the world witnessed in Russia the abolition of class-antagonisms by the nationalisation of land and industrial capital. At the same time the idea of political democracy was cast aside and in its place a congress of representatives chosen by equal suffrage from territorial districts having inhabitants numerically the same was created. There was established a Soviet or Council representing economic groups. It proved for the time a simple and drastic experiment to dispose of the contradiction between political idealism and economic reality.

The Russian model cannot be followed as an example for the reorganization of the modern state, owing to the simple reason, that conflicts have not ceased there despite the uninterrupted working of the new form of government for more than two decades. Jealousies still persist between craft unions of skilled workers and communists, whose contention has become as 'great a fiction as the theory of political equality.' The upshot of all this is that the attempt to demolish property in capital cannot be long a successful idea even. So long as efficient production depends upon skill, skill itself will have to be recognised as a form of property distinguishing the owner of it from the rest.

To-day the world is in the grip of barbarism, blatantly visible in the suppression of political parties that cannot

accept the ideologies of those in power. The fate of the Jews in Germany, the infliction of all kinds of punishment by every form of government on individuals for their political differences, the natural ease with which the state's object is achieved without even a sign of apathy in the act, the inhuman methods and aims of modern warfare born of the desire to exploit smaller nations lacking military efficiency—all these presage an era of unrelenting rule by the sword, in which moral restraints can no longer hope to influence the habits of mankind. Call it despotism or terrorism, it is justified by its capacity to yield power, which in its turn is deemed so supreme a good that the ways of attaining it evoke little or no protest from the witnesses of their barbarities.

What does this all signify? In an unequal society, the power of the state has always been a means of oppressing those who are excluded from the privileges it seeks to protect. In the light of present realities, the character and form of the state has to be re-examined. No longer will it avail the student of politics to explain past forms and blown-up theories. Democracy too is a venture of faith. As it grew to manhood, the British nation found that neither a monarch, nor the landed aristocracy, nor the *bourgeois* could be indefinitely entrusted with the reins of power. So also, we can deduce a lesson from the present welter of political objectives, that no individual and no class is wise enough and unselfish enough to decide the fate of an intelligent people. There should be fresh constructive thought to base the state on actualities as "the guardian of class-relations."

THE STATE AND SOCIAL LEGISLATION IN INDIA

BY

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Social legislation in India is still in its infancy, in spite of the fact that it has had a history of more than a century. Lord William Bentinck among English statesmen and Rajah Ram Mohan Roy among Indian reformers were pioneers in the field of social reform, and through their efforts the inhuman practice of *Sati* was abolished well over a century ago. It is a matter for regret that the noble work initiated by them has not been followed up with the same enthusiasm after the Mutiny. Since 1857 the English statesmen in India have been afraid to meddle with Indian social customs and institutions lest they should be faced with another Mutiny. Along with this fear there has been the other fear that to improve the social and economic conditions of the country rapidly would be to hasten the downfall of British Imperialism in India. Indian politicians, on their side, have of late been so obsessed with the gaining of political freedom, that they have given very little serious attention to the urgent social needs of the country.

It is admitted on all hands that the social evils of our country are largely of our own making. Rightly has it been said that no country suffers so much from self-inflicted evils as does India. Such being the case, the remedy for the most part lies in our own hands. In saying this it is not suggested that political freedom is not a

prelude to and accompaniment of far-reaching social changes. What is suggested is that the initiative for social reform should come from the people themselves and their natural leaders, and not from any alien government.

1. *Difficulties of the Social Reformer.*—The difficulties which face the social reformer are very many and appear to be almost insuperable. Many of the social evils are rooted in long-standing social customs and usages and hoary religious practices. Therefore, to meddle with them means the rousing at once of deep-rooted religious susceptibilities and even antagonisms. The failure of recent legislation aiming at the restraint of child marriage is an illustration in point.

The diversity of the population adds immensely to the difficulty of enforcing social legislation. The Hindus and Muslims, Indian Christians and Parsees, Sikhs and Jains do not all have the same social customs and religious practices or the same personal law. Therefore, to legislate for all of them on social questions seems almost a hopeless task. Any piece of general legislation is likely to offend one religious group or another. Besides such religious diversity, there are also provincial, linguistic, and caste diversities. Looking at the vast array of differing social customs in India, one is tempted to think that India is really a museum of social curiosities.

The crass ignorance of the people and their general inertia also account for the slow pace of social progress in India. A vast majority of the people, for instance, do not understand the elementary biological laws of good breeding. They fail to realise the fact that if India is to become a strong and virile nation taking her rightful place along with the other nations of the world, immediate and persistent attention should be paid to the quality of the population. Mere numbers can be of no avail. Another matter on which crass ignorance stands in the way of progress is the matter of a well-balanced diet. Most people persist in eating the kind of food to which

they have been accustomed all their lives or which has been prescribed for them by religious customs, whether it be nutritive or not. Modern discoveries regarding the nutritive value of different articles of food and the scientific and economic ways of using them are a closed book to them.

The educated people of the country are not making any concerted effort to bring about far-reaching social reforms. Even if they have the will to do it, in many cases their hands are tied by their ignorant mothers, wives, and mothers-in-law. It is as clear as daylight that so long as the womenfolk of India are kept in ignorance and superstition, we as a nation can only hop and not run. It must be said at the same time, to the eternal shame of men, that many of them are not prepared to go against social customs which they know to be injurious and court social ostracism if necessary. Their courage is certainly not of a high order. They do not think anything of sinning against the light which they have seen.

The young men of the country who should be in the vanguard of social progress are not exerting themselves to any large extent. Like their elders, they too are bound down by customs and hesitate to take the plunge. While in recent years youth have brought about great transformations in countries such as China and Russia, youth in India have been lagging behind on the whole. They have shown great enthusiam for spectacular activities in the political field but not the same enthusiasm for dull, drab, and monotonous but useful kind of work in the social field. One possible reason for that is the educational policy of the country which places a premium on docility and submission and does not encourage self-expression.

In addition to these general difficulties, the social worker experiences certain special difficulties for which the governmental machinery is largely responsible. Laws passed are too technical and complicated and are sometimes so clumsily drafted that the man with a legal acumen is always resourceful enough to find a way out. The

general principles of any particular piece of legislation should be stated simply and directly so that the layman will not be at the mercy of lawyers and quibblers. Laws should as far as possible be free from technical jargon. Whatever be the language used, there should be no doubt as to their general meaning and spirit.

A further difficulty is that government at times is apt to think that its task is done when a piece of social legislation has been enacted, which certainly is not its attitude as regards other types of legislation. The fact of the matter is that the task is only begun. It is the business of government faithfully to carry out the laws and the spirit underlying them by a carefully planned and closely supervised administrative machinery. As matters stand, valuable pieces of social legislation begin and end as mere pious hopes. Neither the central nor the provincial government nor the local bodies are much worried about their enforcement. In this respect local bodies have probably been the worst offenders. The remedy for it is to have enthusiastic local officers working under carefully-conducted periodic inspection.

2. *Agencies of Social Reform.*—In a country like India where mass ignorance and poverty are colossal and where people are accustomed to look to government for initiative, the responsibility of government, especially of a popular government, in initiating social reform cannot be easily transferred to other shoulders. In many activities of our national life, government still has the whip hand. The policy of the British Government in recent years has been to delay social legislation as long as possible, and not to take the lead itself. The plea has been that to enact legislation before public opinion is educated is to court sure disaster. Every one is aware of the fate which befell King Amanullah of Afghanistan when he enacted revolutionary social changes for the people of his country without doing the necessary spade work in creating enlightened public opinion in favour of them.

But when we turn to modern Turkey the case is entirely different, where Kemal Ataturk with the use of force has wrought great social changes. The reason for his phenomenal success, even when he expressly went against the injunctions of the Koran, is to be found in the fact that he had just emerged as the saviour of his country by a series of military victories, and the social reforms contemplated were represented as conditions indispensable to the consolidation of the victories gained. What follows from all this is that when a country is on the wave of great political and constitutional reforms and becomes the master of its own destiny, delayed social reforms can be brought about with little or no opposition.

Even the enemies of India admit that India to-day is on the eve of great constitutional changes ; and this is the time when our national politicians should busy themselves with schemes of social reform together with the perfecting of a technique so that when the time comes for their enactment they shall not be caught napping.

The experience of the past few years shows clearly that it is futile to expect an alien government to take the lead in social matters. During the two years that national governments were in power in the provinces, legislation was enacted enforcing prohibition in select areas, debt relief was given to agriculturists, temples were thrown open to all Hindus, and public health measures were passed giving local authorities a greater degree of control over the enforcement of public health rules than what they had enjoyed hitherto.

What part the government of a country should play in the initiation of social reform is a keenly controversial subject. Whatever be our social and political theories, it is freely admitted by all that the State can no longer be conceived of as a magnified policeman whose business is merely to give us protection against internal and external enemies. The State has no *raison d'etre* in our present day world if it does not rapidly become a social welfare

State taking care of course not to hamper individual and group initiative and self-help.

Where the harm done to society is direct and definite and is on a large scale, where the remedy proposed is not worse than the disease, and where the methods of enforcement used are not too expensive and are not likely to bring the government into disrepute, government should take the lead even if it means running against public opinion. If government had waited till public opinion was educated before it abolished *sati* and infanticide, it would have waited indefinitely. Such filthy habits as spitting in public places and answering calls of nature on public roads and by-lanes should be put down with an iron hand. We cannot afford to wait till the ignorant masses of India are educated before these urgent reforms are enacted. Local authorities should be armed with the necessary powers to deal with these matters summarily, as well as with the increasing menace of begging in towns and cities.

Those who oppose positive legislation by the State fail to recognise the fact that legislation itself is an instrument of public opinion. Just as the policeman's club serves to keep even the best of us in the straight and narrow path, legislation by the state can help us to reach high levels of social living at which we are not disposed to live in our ordinary moments. While legislation should take care not to be too far in advance of public opinion as a general rule, it should be somewhat in advance of public opinion so that it can act as a lever in raising public opinion to a higher level.

Legislation in the social field, in order to be effective, need not be of a compulsory character in every case, nor need it be applied to the whole country or to the whole population all at once. There are many cases where permissive legislation can be much more effective than compulsory legislation. A case in point is that of inter-caste marriages. In our modern society there are a few progressive individuals who are willing to transcend lines

of caste in choosing their life partners. Such individuals should be indirectly encouraged by the State by removing whatever legal disabilities there may be in the way. Indirect methods of attack in many cases of social reform are far more effective than direct methods.

Prohibition of liquor in selected areas is indeed a wise step. There is no doubt whatever that the sentiment in favour of prohibition is strong in the country. It is fortunate that on this question both the Hindus and Muslims see eye to eye with each other. Yet to enact provincial or national prohibition all at once is fraught with many difficulties. It will not only seriously cut into State revenues but also throw hundreds of people out of employment. It will also place an undue burden on the police and excise officers. When provincial governments come once again under popular ministers there can be no doubt that prohibition will be gradually extended in the light of experience until the demon of intoxicating liquor is removed from the country altogether.

The case of prohibition is instructive from other points of view as well. It shows clearly that a mere negative measure is of no avail in social matters. It has its bearing upon other aspects of life calling for positive measures. As soon as prohibition in Salem was introduced it was found that many toddy tappers were thrown out of work and that many a man was deprived of the only means he had of enjoying himself. This meant that the government of the day had to organise the leisure hours of the working classes and find employment for those without work. Sporting activities, bajanas and tea shops were introduced. Toddy tappers were trained to manufacture *gur* out of unfermented toddy and many were employed in stone-breaking for the making of public roads. The loss to the provincial revenue was sought to be made good by a tax on sales.

Social experimentation can successfully be made not only in limited areas, as in the case of prohibition, but also with regard to certain classes of the population. A

case in point is that of child marriage. It is an open secret that the Child Marriage Restraint Act of 1929 (popularly known as the Sarda Act) has been observed more in its breach than in its observance, because of the fact that neither the Hindu nor, to some extent, the Muslim religious and social customs were in favour of it. It is, however, possible to apply it to village Christians among whom child marriages are not unknown. In view of the fact that Christians everywhere frown upon child marriage, to exercise compulsion in the case of village Christians is not likely to rouse any serious opposition. When the experiment succeeds among them and the people around see the good results of it in the form of better health, stronger bodies, and longevity of life that will serve as a striking object lesson to the onlookers. If among the Hindus a reform of this nature can be sponsored by progressive movements such as the Brahmo Samaj and Arya Samaj, a great deal can be accomplished. Even such communal organisations as the Hindu Mahasabha and the All-India Muslim League can improve their respective positions by a healthy rivalry in the matter of social reform, instead of wrangling all the time over the loaves and fishes of office and political dominance. Caste organisations can come to the rescue of the social reformer if, instead of dividing the people into water-tight compartments as they now do, they will become missionary organisations burning with a holy desire to improve the social, economic, and cultural conditions of their members.

There are many matters where religious issues are not involved and where a national government can set the pace. For instance, government institutions may be compelled to substitute hand-pounded rice for milled rice and make a greater use of leafy vegetables and such nourishing grains as *ragi* and *cholam*. Everything possible may be done to popularise a balanced diet. The supply of butter milk to prisoners under the Congress Government in Madras was a step in the right direction. For the adoption of such measures what is required is not so much

social legislation as administrative insight and pliability. Government can give a great fillip to indigenous goods by requiring that nothing else should be used in government offices and institutions under its control.

In giving relief to classes of people who are handicapped in one way or another, the responsibility of the State is immense, and yet very little has been done in this direction in India. It is true that there are state-managed hospitals and institutions for the care of the insane. But little or nothing is being done for the feeble-minded who swell the ranks of the unemployed and unemployable, for the deaf mute, the blind, the old and the decrepit. The resources of the people are not vast enough to undertake voluntary relief of these classes. The Indian is proverbially noted for his charitableness, but he has not been trained to put this instinct of his to a scientific purpose. Giving alms to the wayside beggar may soothe his conscience and give him the satisfaction that he is earning merit for himself in some future existence. But it seldom occurs to him that indiscriminate almsgiving gives rise to more social problems than solves them.

This leads us to an examination of the part that voluntary effort should play in the matter of social amelioration. In a country like England where the population is much more homogeneous than in India and where the level of education is high and the gospel of self-help has played an important part in the national life of the people, one finds innumerable societies and clubs seeking to bring about much needed reforms in one direction or other. In that country voluntary organisations have been the laboratories of social experimentation ; and when the pioneer work undertaken by them has proved its worth and when later on it becomes too heavy for their slender resources, the State comes along and takes it over. In India, however, the situation is altogether different. Public enlightenment is still at a very low level ; and a sense of civic responsibility is still in the making.

In spite of all this, it must be said, and said emphatically, that it is foolish to rely upon Government initiative alone in seeking a remedy for our social ills. The home, the school, the college, the press, the pulpit, the cinema, the theatre, the radio and the sports club should all become active agencies for the removal of social abuses. Some good movie pictures in the vernacular have already done a great deal in rousing public indignation against child marriage, the iniquities of caste, and the system of dowry. But much more remains to be done by means of consistent and persistent propaganda. We have not yet realised the valuable part which posters, cartoons, pageantry, and popular songs can play in making people vividly conscious of the social evils to which they have been submitting themselves meekly through the ages.

3. *Social Conditions in India.*—Even the most reactionary of Indians to-day is stung by a patriotic feeling and is looking forward to a time when his country will occupy an honourable place in the comity of nations. Among the many factors which stand in the way of such self-realisation is the poor health and low vitality of the people. It is a well-known fact that the average span of life of an Indian is less than half that of the advanced European. While the expectancy of life in England is 58, it is barely 25 in India. Out of every 1,000 children born nearly 200 do not live to see their first birthday. The death rate is 23 per 1,000 and infantile mortality is 162 per 1,000. Nearly half the deaths registered are of children under 10 years of age, while in England the corresponding percentage is only 12.

To remedy this state of affairs we need both legislation and enlightened public opinion. If a religion or social custom stands in the way of a people living a full and abundant life it is not worth keeping. The system of universal marriage and the universal begetting of children should be discouraged as far as possible. It may even be necessary to levy a tax on marriages and a tax on child birth after the third child. One of the

first things that a national government should do is to stiffen the Sarda Act and make it effectively operative. It is a pity that many innocent children of 12 and 13 begin to live with their husbands and have their first babies when they are barely 15 or 16. Wives of this category by the time they are 30 get prematurely aged and, in some cases at least, their husbands turn elsewhere for feminine companionship.

Public health can certainly be improved by a wider dissemination of health rules and greater extension of hospital facilities. The middle classes are benefiting themselves by practising rules of health and by proper nutrition, but the vast bulk of the people are born in ignorance and die in ignorance. Wide-spread education of a practical character and a marked improvement in the wage level of the people can greatly improve public health. With an average income of 3 annas a day it is inhuman to expect the poor man in India properly to feed and clothe himself and others dependent on him. It may be that some form of common ownership and management of land and all the principal industries of the country alone can give every individual that reward which will enable him to be at his best. The State fixation of a minimum wage, participation of the labourer in the profits of his factory or company, extension of the advantages of co-operation—all these can help the labourer to raise his economic and social standards. But, in the last analysis, they are only palliatives.

Closely connected with the problems of poverty and low level of public health is the problem of beggary which is assuming vast proportions in urban centres. There is no justification for supporting the five million and odd religious fakirs and mendicants in the country, to many of whom begging is only an easy way of making a living. In our big cities, at every street corner and at bus and tram stops one finds swarms of beggars suffering from infectious diseases of one kind or another. It is time that the local authorities were given the power to

segregate them from the general public and provide them with the opportunity to lead a decent existence so long as life lasts. Diseased and deformed beggars should be placed in a Home where they can receive medical care and attention, while able-bodied beggars should be made to work. Well-endowed private organisations such as Annadana Samajams and pious individuals spend a great deal of their substance on the indiscriminate feeding of the poor. If all the money thus spent can be put into a common pool and scientifically dispensed in the interest of social service, the accruing advantages will indeed be great. In a matter like this continuous propaganda alone can bring about the desired change. People should be induced to accept of their own accord a right standard of moral and social values.

In the interest of public health and vitality some of the proposals which one should like to make are:—

1. The stiffening of the provisions of the Sarda Act and the gradual raising of the age of marriage to 18 in the case of girls and 21 in the case of boys;

2. State fixation of a minimum wage, eventually leading to a practicable and well-thought out form of common ownership ;

3. Extension of hospital facilities and institutional care for the diseased, defective, and deformed in the population;

4. The "liquidation" of beggary;

5. The popularising of the laws of public health and of proper nourishment; and

6. The strict enforcement of rules against spitting, answering the calls of nature wherever one pleases, throwing rubbish on public streets, and keeping one's house and surroundings in unhygienic conditions.

Alongside of improving conditions of public health, and in connection with them, we must stress the urgent need there is for the emancipation of women. Students

of Indian history tell us that women were comparatively free till 800 A.D. But since then, partly due to the series of invasions to which India was subjected and partly due to changes in Hindu Society, the position of women has greatly deteriorated. In this day and generation there is no justification for purdah, which is a chief cause of the poor health and low vitality of women. It is an encouraging sign of the times that enlightened women of all communities are fighting against it, and it is likely that the patient propaganda conducted by them will soon result in its abolition.

Although the Hindu Widows' Re-marriage Act was placed on the Statute Book of India as early as 1856, widow re-marriage is still uncommon, in spite of the fact that it is recognised by everybody that such marriages will tend to the promotion of good morals and to public welfare. The Act of 1856 has not removed certain legal impediments in the way of widows availing themselves of the provisions of the Act, and it is high time to bring the Act up to date so that a widow can marry a second time without losing her legitimate right to a portion of her husband's property and to the guardianship of her children.

The Hindu marriage law, says the Rt. Hon'ble Mr. Jayakar, is scandalously one-sided. It favours the men at every turn at the expense of women. The recent bill of Mrs. Subbaroyan to penalise both polygamy and polyandry is in accordance with the spirit of the times, and no stone should be left unturned till such a bill is passed into an Act. Till women have equal rights with men, whether these rights be conjugal, civic or political or rights pertaining to property and inheritance, we shall continue to be a backward people. In the matter of divorce too, our laws need to be liberalised and equalised as between men and women, so that charity will be required absolutely on both sides if married life is to continue intact and on an honourable basis. One rejoices to find that the Indian State of Baroda has passed laws

bearing on the emancipation of women which are in advance of laws in the rest of India.

The Maternity Benefits Act which was passed some years ago is not enforced anywhere in the Madras Presidency. It is found only in 11 out of the 25 districts; and even here the European employers have been more conscientious in paying these benefits than Indians. Although they employ only $\frac{1}{8}$ of the total number of women registered, they pay half of the total benefits.

Traffic in women and children is a serious social and moral problem all over the world. In India it is made particularly worse by the presence of the Devadasi system. The Immoral Traffic Act in Madras has lately been amended so as to make illegal third party profits at the expense of the Devadasi class. The Act is to operate for the present in the City of Madras or a Municipality or an area within 3 miles surrounding these areas. The Devadasi system has been entirely abolished in Travancore, Cochin, and the Bombay Presidency.

If women have suffered untold miseries at the hands of men, so have children. The various Age of Consent Acts passed from time to time are a sad commentary on the fate of children in India. A crying need of the hour is for a comprehensive Children's and Young People's Act such as that which was passed in England in 1932. Education cannot be thorough till the rights of children have been well defined and enforced. There is need also for a Shop Assistants Act such as that passed by the Bombay Government, as well as for juvenile courts. In 1927 the Children's Act was passed, and this has been in operation in the three Presidencies of Madras, Bombay and Bengal. It gives the right to the Children's Aid Society to take away children who are being abused or exploited. Further legislation is needed for the care of dependent children as well as for the abolition of conditions which make for such dependency.

Both the State and the public have a great responsibility toward dependent and defective children. Some

of their duties are, as pointed out by Dr. Manshardt, (1) to strengthen family life, (2) to provide proper types of schools where children will not only be taught but also have their welfare attended to, (3) to provide play and recreation facilities, (4) to substitute planned social work for indiscriminate charity, (5) to tighten laws regulating the employment of children, begging, etc., (6) to provide satisfactory housing facilities, (7) to engage properly trained workers in the child welfare and protection fields, (8) to impart religious (but not sectarian) training and character-education, and (9) to inspire the police to regard their work not as repressive, but as guardianship.

Next to the elevation of the position of women and children, caste offers a serious problem to social workers and legislators. As long ago as 1850 the Caste Disabilities Removal Act was passed laying down that no person should lose his rights of property or inheritance on change of religion or loss of caste. The Act was intended to remove the legal disabilities of converts as well as those who were degraded or ex-communicated from their caste. In spite of such a progressive measure passed almost a century ago, caste is still with us, dividing the country into water-tight compartments and denying to millions the right to equal opportunity. In recent years temples under government management have been thrown open to the use of the scheduled castes ; and in this reform Travancore has made history. The Congress Government in the Madras Presidency began a scheme of providing a public well for each village so that every one, especially members of the Depressed Classes, could have access to pure water. Schools have been provided in large numbers either exclusively for the depressed class children or for children of all castes and no caste. Such inhuman customs as "untouchability" and "unseeability" are gradually disappearing; and under the impact of Western civilization, and as a result of the growing national ferment in the country, the entire caste system is breaking

down. The railway and the motor bus and the coffee and tea shops are hastening its downfall. Inter-caste dining is nothing uncommon among educated people to-day. But inter-marriage between castes is still a rare phenomenon. In Baroda no headman of a caste can now punish a person for marrying outside the *gol* ; if he does, he is himself liable to punishment. In British India a number of bills have been sponsored from time to time to legalise marriages between members of different castes, Sir Hari Singh Gour having taken an important part in the Special Marriage (Amendment) Bill in 1931. But nothing has come of all these efforts, and the principle of endogamy is still secure.

The least that the State can do is to see that nobody is excluded from the use of public wells, public roads, and public schools or from government posts simply because of his caste. Communal rotation in appointments to government posts has gone some way in redressing grievances. But there is no hope of caste losing its rigour till the whole population of India becomes inter-marriageable. In attaining this end, government will do well to disallow such filthy customs as carrion eating prevalent among certain exterior castes and abolish such dirty work as scavenging by rapidly introducing the bore-hole system in the villages and flush-outs in towns and cities. Government should also insist upon providing equal opportunity to all, irrespective of caste differences. The Arya Samaj's approval of inter-caste marriages should be availed of by more of its members. In this connection, it is significant to note that at the 1931 census two million Hindus declared that they had no caste at all. Writing on the evils of caste, an I.C.S. officer goes so far as to say : "The fall in our trade, the stagnation in our arts, the dying of our inventive skill, the inefficiency of our coolies and even the indifference of our scavengers are mainly due to the inertia of caste."

One other problem to which we may refer in passing is the enormous growth of the Indian population during

the past fifty years, largely due to the maintenance of law and order. Civil disturbances, famines, and infanticide in the past acted as checks upon population. But with the State regulation of these evils the population is increasing by leaps and bounds. The Indian birth rate is as high as 34.5 per thousand of population and with the extension of medical facilities, the death rate is gradually coming down, though it is still twice as high as in England, chiefly because of the high death rate among infants and women between 15 and 30. Cholera, plague and other fell diseases which swept off several thousands every year have been brought under control. Fevers of one kind or another still account for more than 50 per cent. of deaths and to the weakening of millions of people. But there is no doubt that medical science will bring all that under control.

So the indications are that population will go on increasing indefinitely, outstripping the means of subsistence. Whether India has reached an optimum level with regard to her population is a much debated question among economists. The spectre of over-population can, to some extent, be averted by (1) extensive and intensive cultivation, (2) by transfer of population to less crowded occupations, (3) by subsidiary occupation, and (4) by well-regulated emigration. But some form of birth control or abstinence is necessary if the Indian population is to be kept within reasonable limits and the quality is to be improved to such a level where it can successfully compete with the advanced communities of the world. If this end is to be realised, we need mass education, higher wages, rise in standards of living, and giving up of the archaic belief that the begetting of sons is a religious duty. As a recent writer puts it, baby weeks should be replaced or accompanied by birth-control weeks.

JUDICIAL REVIEW AND CONTROLLED CONSTITUTIONS

BY

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The doctrine of judicial review of the acts of the legislature or of the executive, when they exceed their powers as defined in the instrument of Government in countries with legal systems based upon British jurisprudence including the United States, is traceable to the principle of "the rule of law" as applied to a written constitution with defined powers of different governmental organs or with defined powers of the different units of a federal or of what may be termed a composite State. English jurisprudence has always recognised that the acts of a legislature of limited jurisdiction, whether the limits be as to territory or subject-matter, may be examined by any tribunal before whom the point is raised, though within the appointed spheres the powers of the legislatures are absolutely supreme. The point was almost regarded as axiomatic by Hamilton, one of the fathers of the American Constitution, who, in the 78th number of the 'Federalist,' (quoted in almost all the leading text books on the American constitution) points out that in a constitution which contains specific limitations and exceptions to legislative authority, such limitations can be preserved in no other way than through the medium of the courts on whom in a federal system is cast the duty of declaring void all legislative acts contrary to the constitution.

It is immaterial whether the written constitution is in the nature of a Patent emanating from a sovereign

or is a charter or an act of the Imperial Parliament of Great Britain or, like the constitution of the United States which unlike those of the Dominions of Canada and the Commonwealth of Australia, is not contained in any statute but was adopted by the people acting through certain Conventions.

It is however interesting to note that the theory of judicial review has, on the American model " but engraved on a Civil law foundation," been made a feature of the constitutions of other countries ; " the majority of the nations of the earth, though adopting written constitutions have retained the doctrine of legislative supremacy." (Haines, Judicial Review of Legislation in Canada, 28 Harvard Law Review 565, cited in Willis on Constitutional Law, Page 72.)

In Great Britain, owing to the theory of the omnipotence of Parliament, the validity of no Act of Parliament can come under judicial review. It is only the rules and bye-laws passed under an Act of Parliament or the acts of municipal bodies or corporations constituted under an Act of Parliament that can be examined by the Courts as to their validity.

Starting with these premises, one may take a bird's-eye-view of the part played by the judiciary in the moulding and development of the American and the Dominion Constitutions.

America. In a brilliant prize essay under the heading " The Supreme Court and the National Will " published in 1937, Mr. Dean Alfange (to whom was awarded the Theodore Roosevelt Memorial Prize) has reviewed the work of the Supreme Court of the United States as an interpreter of the Constitution. As is well-known, the Constitution of the United States was designed to organize national power in order to deal with national problems ; but it was built on the existing realities of State autonomy and individual liberty. The Constitution distributed sovereignty between the Federal Government and the States by investing the

Federal Government with certain enumerated powers reserving all the remaining powers to the latter. The constitution also provided for a separation of the powers of the different organs of Government while guaranteeing individual rights in certain specified matters. A bare statement will make it clear that the most distinctive characteristic of the American system of Government, as is the case with all the later forms of federalism, is the diffusion of sovereignty and the necessity of a constitutional sanction being found for all Governmental action, state or federal. A constitution so framed, with a complicated machinery of formal amendments might have easily proved a most rigid and cast-iron scheme of Government, but in the result it has proved a most flexible instrument by the combined process of amendment by political usage and judicial interpretation. There is no more interesting study for a student of constitutional history than the process by which the Supreme Court has attained its present position as the final interpreter of the constitution and the part the Court has played in moulding the constitution to meet the needs of a most dynamic society. To start with, there is no special article in the constitution vesting the jurisdiction in the Supreme Court to veto an act of the Congress on the ground that it is in excess of the legislative powers of the Congress under the constitution. The second paragraph of Article VI enacted in general terms that " the Constitution and the Laws of the United States made in pursuance thereof shall be the supreme law of the land." The latter part of that article merely provided that " the judges in every State shall be bound thereby, anything in the Constitution or the laws of the State to the contrary notwithstanding." From the terms of Article VI above set out, it is clear that there is no power in terms vested in the Federal Courts or even in the Supreme Court to veto any legislation passed by the Congress unless such a power is implied from the declaration that a law of the United States made only " in pursuance of" the Constitution is the supreme law of the land. The power of the courts and of the Supreme Court

to declare a law passed in excess of its powers by the Congress was rested by Chief Justice Marshall in the leading case of *Marbury* v *Madison* on the inherent power of the courts under a written constitution and upon its being pre-eminently the province and duty of the judiciary to say what the law is.[1]

It will thus be seen that judicial review established itself by the inner logic of a system conferring definite powers upon the various State agencies and the application of the principle of the rule of law to such a system. There have been protests now and again against the judicial veto of federal and state legislation, but the supremacy of the Supreme Court as the final interpreter of the constitution has survived attacks from every quarter. In the actual working of the American system, the "Supreme Court has in effect functioned as a third branch of the legislature." It has wonderfully reacted to the changing needs of a progressive society and served " to expand the national power by stretching the letter of the constitution, while at the same time acting as the guardian of individual liberty." While in the early days of its history the main problem before the Court was to reconcile national authority with State sovereignty, it is at present confronted with the basic problem of Government, namely, " reconciliation of liberty with authority, of individual freedom with national organisation."[2]

In the discharge of its judicial function, it has observed certain cardinal principles :

(1) The jurisdiction of the Court is exercised only in cases and controversies. A case would have to be some suit instituted according to the rules of legal procedure by an aggrieved party. The Supreme Court has stoutly refused to give advisory opinions, such not being a strictly judicial function according to the view of the Court.

(2) The Court will go no further as a censor of laws than is necessary for the decision of issues actually in litigation before it.

1-2. The above two paragraphs are largely based on the Essay of Alfange referred to above.

(3) It always proceeds on the theory of the presumption of the validity of Acts.

(4) It has set before itself "the ideal of trial and error" and has not hesitated to dissent from or overrule earlier decisions.

To appreciate the work of the Supreme Court is of course not to ignore the oscillations of judicial opinion that have characterized the work of the Court sometimes coinciding with the changes in the personnel of the Court, now the Court appearing to act as the champion of individual liberty and now of a new social order, now as the protagonist of State right and at another time of national solidarity. The Court also never considered itself bound by judicial precedent to the same extent as the superior judiciary in England.

The "intentions of the people" who adopted the constitution have loomed large in the leading American judgments. In the interpretation of the Constitution, the Courts have also attached considerable importance to the course of conduct pursued by the legislature and by the executive in particular fields of action. They have not hesitated to rely on reports of Committees and of the legislature and other external aids to a much larger extent than the Courts under the British system ever did. In the words of Professor, (now Mr. Justice) Frankfurter in the treatise on the Supreme Court: "Whereas British Courts approached the interpretation of the Constitution on the principle that the constitution must speak from within, the American Courts have, to a certain extent, approached the problem from without". Closely connected with this mode of approach is the American doctrine of "instrumentality" which, though it might have undergone several alterations since the days the doctrine was formulated by Chief Justice Marshall, still continues to be a doctrine of American Constitutional law and interpretation. The gist of this doctrine is that as the essence of the federal scheme of government the Federal and State Governments should be sovereign and independent within their respective spheres; there is an implied prohibition

in the constitution that neither the Federal nor the State legislature should pass any enactment entailing any such interference. It need hardly be pointed out that the doctrine of federal instrumentality was never accepted by the Privy Council in the interpretation of Dominion Constitutions.

Australia :—In Australia the Federal Constitution is, as in America the supreme law of the land and is the fountain of the Federal legislative, executive and judicial power. The Constitution of the Commonwealth is contained in an Imperial enactment.[1] The Commonwealth Constitution does not create the constitution of the States, but proceeds on the continued existence of the States or State power. Section 106 of the Act provides for the continuance of the constitutions of the States after federation until altered in accordance with state law. Section 107 provides that every power of the State Parliaments shall continue, unless it is (*a*) exclusively vested in the Commonwealth, or (*b*) withdrawn from the States by the Constitution. In regard to the powers vested in the Commonwealth Parliament by the Constitution, the legislative powers vested in the Commonwealth Parliament may be classed under two heads :

(1) " *Exclusive*."—Powers which are exercisable by the Commonwealth alone. The more important of such powers are the power to impose duties of customs and excise and to grant bounties, defence, the coining of money and the making of anything but gold and silver coin a legal tender in payment of debts, and a few other important matters.

(2) There are other powers which may be described as " Concurrent," that is to say, they are exercisable by both the Commonwealth and the States, provision being made for the supremacy of Commonwealth laws in cases of conflict. The area of concurrent jurisdiction is very wide comprising as it does 38 clauses of legislation and

1. Commonwealth of Australia Constitution Act, 63 and 64 Vic., c., 12.

including the 39th, giving jurisdiction with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in any House thereof, etc., etc. At the same time any statute passed by a State and relating to matters transferred to the Commonwealth in regard to the "Concurrent" field is valid unless or until the Commonwealth itself legislates. And State laws are invalid under section 109 only to the extent of their inconsistency with the federal laws.

Though in theory the reserve powers are in the States and the powers of the Federal legislature are confined to the enumerated heads of legislation, a perusal of the lists open to legislation by the Federal legislature will make it quite clear that as the enumerated powers are comprehensive it is not easy to place a statute outside the ambit of the federal power.

In Australia, as under other written constitutions with defined powers, any law exceeding the powers of the legislature of the Commonwealth is void. The Constitution and the laws of the Commonwealth are, by clause V of the Constitution Act, "binding on the Courts, Judges and people of every State and of every part of the Commonwealth." It is the essential function and duty of the Courts to adjudicate upon the question as to whether any Federal or State Act is within the competence of the particular legislature. The question may be raised in any Court and does not depend upon the status of the Court. The Constitution has provided that the High Court alone can finally determine questions of interpretation of the Commonwealth Constitution, no appeal being permitted from it to the Privy Council unless the High Court certifies that the question is one which ought to be determined by His Majesty in Council; a certificate may be granted for any special reason. But, in the early years of the working of the Commonwealth, a difficulty was experienced by reason of the fact that there is a direct right of appeal from a State Supreme Court to the Privy Council in certain classes of cases, and there was nothing to prevent a State

Court from taking cognizance of a case in which constitutional questions might be raised. Therefore a situation was created by which the High Court might come to one conclusion in a case disposed of by it in regard to the interpretation of the Constitution and might refuse to give leave to appeal to the Privy Council and the Privy Council might come to just the opposite conclusion in an appeal to it from a State Court. To meet this position the Commonwealth Parliament, in exercise of its powers under Ss. 76 and 77 of the Constitution, enacted the Judiciary Act of 1903-7. Section 40 (A) of the said Act provides that if in any case pending before the State Supreme Court there arises any *inter se* question the Supreme Court shall proceed no further and the case is automatically removed to the High Court. The Judiciary Act therefore provides for a speedy disposal of constitutional questions and makes the High Court of Australia practically the final interpreter of all constitutional questions.

For a number of years after the enactment of the Constitution in 1900 the High Court of Australia, largely influenced by the fact that the Australian Constitution was modelled in many respects on the American Constitution, showed a marked tendency to borrow American constitutional doctrines, especially in such matters as the American doctrine of the mutual non-interference with State and Federal instrumentalities, and secondly by seeking to settle first the powers reserved to the States. The theory of a compact between the States also loomed large in the earlier decisions. There was a distinct reversal of this tendency from the year 1920, since the decision in what was known as the "*Engineers' Case*,"[1] from which date the rule was laid down in distinct terms that the only duty of the Court was to expound and give effect to the terms of the Constitution Act without reference to any extraneous principles. In others words, the Constitution is to be interpreted in the same manner as any other

1. *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Company Ltd. & others*, 28 Com.L.R. 129.

statute, namely, by reference to its terms and those alone, without reference to any extraneous grounds such as grounds of policy or the nature of the federal compact. Of course, that is not to ignore the intrinsic distinction existing between an enactment under which a constitution is enacted and laws are made and the municipal laws made in the exercise of that constitutional power. The Court will have necessarily to bear in mind that a constitution is not a code running into details, that many powers are conferred by necessary implication rather than by express words and that legislative power, while it must relate to particular subject-matter, must necessarily extend to new developments. As a result of the change in the mode of approach in interpreting the constitution, it is common knowledge that many principles which were acquiesced in and practically acted upon for several years were completely overthrown, and the High Court was able to make a change in the law which Parliament itself could not have made. In strict theory, the High Court merely declared the law in 1920 as it did earlier, but the Court's decision in 1920 was in effect to change the constitution as interpreted in the earlier years.

In the work of judicial interpretation the High Court in recent years has set before itself the normal limits as to judicial function observed elsewhere. The Court will not give decisions on abstract questions and will not enter upon the interpretation of the Constitution unless it is absolutely necessary to the decision of the particular case. The jurisdiction of the Court can be invoked only when there is a cause in which the rights of litigants are in issue. It will proceed on the presumption that an impugned enactment is a proper exercise of legislative power unless it is clearly proved to be the contrary. At the same time, it will not countenance a colourable exercise of power; it will address itself to the pith and substance of the legislation attacked before it.

In regard to the proper connotation of judicial power it has proceeded on the American theory and on the theory generally accepted by English lawyers and courts

(contrast the recent tendencies, as also the Judicial Committee Act of 1833) that the giving of an advisory opinion does not come within the judicial function of the Court. In *In re the Judiciary Act*[1] the High Court held to be *ultra vires* of the Commonwealth Legislature, Part XII of the Judiciary Act which purported by S. 88 to give the High Court jurisdiction to hear and determine any question referred to it by the Governor-General as to the validity of any enactment of the Parliament of the Commonwealth and by S. 93 to make the determination final and conclusive and not subject to any appeal.

In dealing with the ambit of legislative power, owing to a very large number of subjects being in the Concurrent List, the High Court of Australia is not confronted to the same extent with the problem of reconciling two mutually exclusive lists as the Supreme Court of Canada and the Privy Council in appeals from Canada.

Constitution of Canada.—The Canadian Constitution is contained in the British North America Act of 1867. While it is true, as is pointed out by Lord Haldane in the leading decision of the Judicial Committee in 1914 A.C. 237, " that the Canadian Constitution was founded on the Quebec resolutions " and "in a sense must be accepted as a treaty of union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source." The second of the resolutions passed at Quebec in October 1864, on which the British North America Act was founded, shows " that what was in the minds of those who agreed on the resolutions was a general government charged with matters of common interest and new and merely local Governments for the Provinces. The Provinces were to have fresh and much restricted Constitutions, their Governments being entirely remodelled." The

1. *In re* the Judiciary Act, 29 Com.L R. 257.

plan of legislative distribution adopted was to assign to the Provinces 16 enumerated subjects including a power to legislate in regard to civil rights and a general power to legislate on all un-enumerated matters of a local or provincial nature. The Dominion Legislature was given the power " to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Provinces ; and for greater certainty but not so as to restrict the generality of the foregoing terms of the section, it is declared that notwithstanding anything in the Act the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the class of subjects hereinafter enumerated " and then follow 29 enumerated subjects. If the two sections are read together without the aid of judicial decisions bearing on their interpretation they would support the construction that the Provinces possessed certain defined, enumerated powers which include a general residuary power over all matters, not specifically set out, of a merely local or private nature in the Province and that the power of the Dominion Legislature extends to certain enumerated subjects including a general power to legislate for the peace, order, and good government of the Dominion. And this was what was apparently the plan of legislative distribution according to the Confederation debates. But it is well-known that by a process of judicial construction the power relating to the peace, order, and good government of Canada has been confined to the narrowest limits and has been held to apply only to cases arising out of some extraordinary national peril. This construction of the power relating to the peace, order, and good government of Canada has been the subject of adverse criticism in Canada and one cannot but fail to notice a change in the judicial opinion in the last few years in the direction of widening the powers of the Dominion Government.

In the construction of the mutually exclusive lists the problem before the Judicial Committee and the Supreme

Court of Canada has been one of reconciliation of the two lists, which has given rise to the framing of certain principles to be applied in deciding within which section the impugned enactment falls. In the language of the Judicial Committee in *Parson's case*, 7 A.C. 96 : "It could not have been the intention that a conflict should exist and in order to prevent such a result the two sections must be read together and the language of the one interpreted and, where necessary, modified by the other."

In approaching the problem as to the *ultra vires* or *intra vires* character of any impugned enactment, the Courts have regard to the fact that the whole area of self-government is covered in the grants of legislative power to the Federal and Provincial Parliaments and on the presumption as to the validity of an impugned Act.

In the process of interpretation of the Constitution various principles, which cannot be dealt with in the course of this review have been developed such as the pith and substance of the enactment being a governing principle in regard to the *ultra vires* or otherwise of an impugned enactment, the Court addressing itself to the aspect and purpose of a legislative measure, and the need for implying certain ancillary and incidental powers to the powers expressly conferred by the Constitution. But a close examination of the decisions bearing on the subject will lead one to the conclusion that by a process of judicial interpretation the constitution has been given a shape different from that contemplated by the framers. In Australia, the result of judicial interpretation has been for the Federal Centre to develop at the expense of the States contrary to the express intention of the original framers ; in Canada for the Provinces to develop into something like States, though recently a reverse tendency is noticeable as the result of strong Canadian national consciousness.

With a view to prevent any uncertainty in regard to any given piece of legislation, in 1875, 1891 and 1906 Acts were passed by the Dominion Parliament authorising

the executive government of the Dominion to obtain by direct request the decision of the Court on questions both of law and of fact, and nearly all the Provinces have passed Acts in similar terms requiring their Courts to answer questions put by the Provincial Government. In the case reported in 1912 A.C. p. 575 the Privy Council upheld the validity of these Acts holding it to be *intra vires* of the respective legislatures to impose this duty on the Courts and observed that though powers to that effect were not granted in express terms by the British North America Act of 1867 they were not repugnant thereto but incidental to the complete self-government of Canada which was contemplated by the Act. Their Lordships, while recognizing that the answers given in the exercise of such a jurisdiction were advisory in their character, held that by giving answers to questions propounded to them the Court does not cease to exercise a judicial function, and refused to follow the American and Australian decisions on the subject. Their Lordships rested their decision on the long established practice in Canada and the practice followed in certain cases even in the United Kingdom. This procedure has helped to elucidate the Constitution in several respects and enabled to some extent the early determination of a question raised as to any particular enactment being *ultra vires*.

India. In regard to the distribution of subjects, the constitution under the Government of India Act is *sui generis* and does not follow any particular model. Following the Australian example there is a large number of subjects which are treated as concurrent. At the same time the Canadian plan is followed in particular subjects being allocated to the Centre and the enumerated subjects to the Provinces. There is no general residuary clause in the Provincial List on the lines of all "matters of a local and provincial nature" as in Canada nor is there any residuary clause in the Federal List. The attempt has been to exhaustively enumerate as many subjects as possible in the Provincial, Federal and Concurrent Lists respectively and leave it to the Governor-General to

allocate any particular subject to the Centre or to the Provinces where such a power does not fall within any of the lists.

If and when the States join the Federation there will be the further problem, arising out of Instruments of Accession, namely, the reservation of particular subjects with limitations and conditions and the problem of State sovereignty. According to Mr. Justice Frankfurter owing to the complexity of the Indian problem "with the partners of our population, the social and religious differences, the tantalising adjustments that had to be made to bring the provinces and princes within the same federation, the Government of India Act, 1935 formulates a plan of exclusive federal powers, exclusive Provincial powers, and concurrent powers, much more complicated than that provided for any other English-speaking country."[1] The distribution of legislative power, as in the Government of India Act, must necessarily lead to a large volume of litigation with as many as eleven Provinces, even, if only the eleven Provinces and the Centre are actively functioning without even the States joining the federation. It may at once be conceded that the most carefully planned distribution of legislative power cannot avoid a certain amount of overlap and confusion. Where the entire field of Government must be co-ordinated and a planned economy is the foundation of all modern Governments distribution of functions is the very essence of a federal scheme of Government and Federalism in its actual working may accentuate legalism. This problem was to some extent envisaged by Parliament and provision was made for an application being made by the Advocate-General for the Federation or the Advocate-General of a Province moving for a transfer to the High Court of a case involving the question of the validity of any Federal or Provincial Act.[2] There is also a provision in the Act for the Governor-General making a reference to the Federal

1. Mr. Justice Frankfurter: Mr. Justice Holmes and the Supreme Court.

2. S. 225, Government of India Act, 1935.

Court and obtaining advisory opinion, though the terms of the section make it clear that the power is intended to be exercised in special cases of public importance, and thus far it has been availed of only in one case[1].

If only the time during which Part III of the Act has been in force is taken into consideration, there is no reason to suppose that almost every important piece of legislation will not be the subject of attack. The heated controversies in the press and on public platforms in regard to the various measures passed by the Provincial Legislatures, the inevitable opposition of vested interests whenever a legislation of a new type is undertaken, and the number of cases before the Federal Court even within the short span of two or three years lead one to believe that the volume of litigation attacking the validity of legislation will be on the increase.

There is also the problem that the uncertainty as to the validity of legislation must in public interests be resolved at as early a date as possible. It may be conceded that consistently with the fundamental concepts of British jurisprudence the ultimate arbiter in regard to the question whether any Act is *ultra vires* or *intra vires* in regard to the distribution of legislative power can only be the Courts, with the Federal Court or the Privy Council at the apex.

The question however remains, whether consistently with the principles of Federalism it is possible to minimise the chances of litigation as also to secure an early determination of the *intra vires* or *ultra vires* character of any particular piece of legislation which must necessarily arise in any federal scheme of Government.

There are a few possible solutions of this problem of litigation and uncertainty regarding the validity of legislation. Where the only question involved is whether the power resides in the Centre or in the Federation, there is no reason why a provision should not be enacted to the

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1. *In the matter of* The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, (C. P. and Berar Act XIV of 1938), (1939) F.C.R. 18.

effect that it is only the Governments concerned that can attack a piece of legislation. If for any reason that course is not found to be feasible, it might be enacted that a private party must obtain the consent of the Governments concerned, complying with certain statutory formalities, as a condition precedent to assailing an Act of the legislature as being *ultra vires*. There are various provisions in the statute book of India enjoining the sanction of the Government, a public officer, or an Advocate-General, before a certain type of litigation is launched. There is nothing inconsistent with the fundamental principles of British jurisprudence in making it obligatory upon a party challenging a legislation obtaining the consent of the Governments concerned or in the Constitution Act enacting that a measure passed by one legislature can only be attacked at the instance of the concerned Governments.

The question as to the possibility of a legislation being immune from attack after a particular length of time was considered in the White Paper, though it was finally ruled out by Parliament. There are serious objections in legal theory to such a procedure. It is conceivable that there may be no occasion for an attack of the measure for any particular length of time ; it must be borne in mind that, an individual cannot be clothed with a right to impeach any legislation unless there is a definite infringement of his rights. Further the immunity of a piece of legislation from attack on constitutional grounds after a lapse of time might lead to an indiscriminate encroachment of the Provincial into the Central field and *vice versa*, and as a result, by the mere acquiescence of the constituent parts, there may be an entire change in the constitutional structure without reference to the people or the authorities from whom the constitution might have emanated.

Instead of merely leaving it to the discretion of the Court to direct a transfer as does S. 225 of the Government of India Act, there is no reason why the Australian model should not be followed and why every case involving a question of the interpretation of the constitution should not

be transferred to the High Court of a Province to be disposed of in the High Court by a Special Bench constituted for the purpose without there being any scope for appeals within the Court itself.

The experience of Canada shows that too much importance need not be attached to the traditional argument against an extension of the advisory jurisdiction, and there is no reason why the expedient of advisory jurisdiction may not be had recourse to on a larger scale than at present. The problem is really one of balancing the arguments of convenience and inconvenience arising from such a procedure. On the one hand it may be argued that it is much better that a statute is viewed in the light of special facts arising in the course of a litigation, that advisory opinions carry with them an academic flavour, or even that a large scale utilisation of the advisory jurisdiction might impair the independence of the judiciary —an argument however to which no importance need be attached in the light of experience gained in the working of the constitutional procedure in Canada and of various enactments in India which provide for the advisory jurisdiction of the High Court being invoked in certain types of cases.

The possibility of expanding the Concurrent List on the Australian model and reducing to a minimum the Exclusive List might also be thought of when the revision of the constitution is undertaken.

With a view to minimise the chances of litigation, the existing Indian constitution has introduced various provisions ousting the jurisdiction of the courts in regard to the exercise of powers by the Governor and the Governor-General in certain matters, the proceedings of the Legislature and similar matters, following in this respect the example of other written constitutions. There is not however much scope for extending the provisions taking away the jurisdiction of Courts.

Whatever form Federalism may take and whichever solution might be suggested for its harmonious working,

a federal scheme of Government has been the only form of union tried in different parts of the globe for reconciling the yearning for a wider nationalism with centrifugal forces at work in any society tending towards local autonomy and a provincial patriotism. That does not rule out a counter tendency towards a closer union or even towards a unitary form of Government after federalism of some kind has been worked for some time.

In India, in spite of differences existing among different schools of politics, no section of political thought has expressed itself against a federal scheme of Government as such. While on the one hand the larger interests of India demand as a matter of economic and political necessity a single, central governmental machinery for exercising the functions in regard to such vital problems affecting the national well-being as banking, currency, international trade, and defence, the interests of agriculture, the work-a-day industrial problems, the varying conditions of India and its geographical extent make Provincial and Local autonomy of a plenary character inevitable in any constitutional structure that may be erected. The wit of the politician and the ingenuity of the constitutional lawyer have not devised any other solution for such a state of things than a federal scheme of Government and any federal scheme, however delicately and carefully balanced, carries with it certain complexities and difficulties. The harmonising of the different parts of the structure can only be secured by a continuous adjustment, assuming of course that the tree that is planted has sustaining roots which will help a free growth. Any constitution, however carefully devised, is what a people make of it and no machinery can be a substitute for the good sense of a people and the legislatures and for the sound patriotism of the ordinary citizen. And all that can be expected of the judiciary is that, while guarding the constitution, it will ordinarily set itself against thwarting the legislative will of the nation expressed through the accredited legislatures.

It is too soon to predict what direction the Indian Constitution may take as the result of judicial review, as there does not seem to be a finality even in regard to the constitutional framework and as it is agreed on all hands that there must be some changes so as to give full and free scope for national development. In the few cases that have come before the Federal Court, there has been no disposition on the part of the Court to depart from the well-settled principles of construction laid down by the Judicial Committee in appeals from the Dominion Courts, though there has been a tendency in that direction in the rulings of one or two of the Indian High Courts.[1]

1. For information about the Canadian Constitution I have drawn largely upon the works on the Constitution of Canada by Professor Kennedy, and regarding Australia I have relied mainly on The Law of the Australian Constitution by Kerr, and Legislative and Executive Powers in Australia by Wynes.

COMPANY LAW

Plea for Legislation

BY

T. R. VENKATARAMA SASTRI, C.I.E.

This is a plea for legislation for the solution of certain difficulties that have arisen in our courts in the domain of Company Law. If conflicts have to be avoided, or co-operation has to be secured, between courts of one State, municipal legislation is sufficient to compass it. If conflicts have to be avoided or co-operation has to be secured as between the courts of different states, it can only be secured by a body of laws recognised and administered by the courts of the different States by some sort of mutual understanding, or by legislative provisions in each State in regard to those difficulties. Such a body of laws does exist and goes by the name of International Law. Where there is municipal legislation, it takes precedence of this unwritten body of laws. But in the absence of provision in any municipal Statute, rules of International Law must govern the decision of the case.

These rules have grown in the course of centuries. States have geographical boundaries and the laws of the State have force within those boundaries. But life could not be held within any such boundaries, and has never in fact recognised these boundaries as setting any limits to its activities and was never wholly governed by the laws of one State. Marriage, property and business often connected man with more than one State and rights and liabilities had to be worked out in many jurisdictions. Writers and thinkers have suggested solutions for the adjustment of possible conflicts. They have been adopted

in international practice and have attained the degree of uniformity that would justify the appellation of International Law being applied to them or the description that they were founded on international comity. But being unwritten laws founded on the broad principles of justice and equity, they varied in the actual administration in small details. If the administration of the principles of equity within the limits of one State often varied with the measure of the Chancellor's foot, it should not be surprising that International Law as administered in different countries should differ in minor details. Notwithstanding their negligible differences, International Law is as good and definite a body of laws as Equity is.

It is not therefore as if the difficulties arising from conflict or lack of co-operation between the courts of different States is a new kind of difficulty not envisaged ever before. Provisions have been found for their resolution by the application of principles which all countries have, in a manner, agreed to apply in regard to their mutual relations.

The Companies Act makes provision for the creation of artificial persons like companies, how they are to be created, how they are to function during life, and how they may finally be wound up and dissolved. The generality of provisions was framed without an eye on foreign companies. But such provisions were used to wind up foreign companies also which did business within the State. Experience had shown the necessity for such use of provisions. The part of the business that is transacted within the State may require to be dealt with. There may be shareholders, creditors and assets within the jurisdiction. They may require to be protected in relation to the company as a whole, or in relation to the company functioning in the locality. The English Companies Act of 1862 makes provision for the winding up of unregistered companies in language which indicates that foreign companies registered in their own State should be wound up in other countries as unregistered companies. It was at one time contended that as foreign companies

cannot be dissolved, they cannot be wound up as unregistered companies. It is now settled that foreign Courts have jurisdiction to order a winding up of a company registered in other States as an unregistered company. See *In re Matheson Brothers*[1]. It can only be dealt with as an unregistered company. Registration as the creation of a new personality was in another State and that State alone can dissolve its own creation. While foreign countries recognise the artificial person during its lifetime as part of the rule of international comity, they cannot, when it ceases to function, dissolve it—the act of dissolution being with the authority which brought it into existence. But legal rights having been created within the limits of the State, a winding up as of an unregistered company is open, and all that is open, to that State.

The winding up of a company may thus be in each jurisdiction in which an incorporated company may have been functioning in active life. If the winding up is only in one jurisdiction, then the Companies Act in force in that jurisdiction prescribes all the rules for its winding up. If the company is to be wound up as a whole, then steps may be taken for its winding up and dissolution in the country of its incorporation without steps being taken in other jurisdictions, except at the instance of the liquidator in the country of incorporation. Or there may be orders for the winding up in all jurisdictions separately. In this case, the Courts may act in co-operation or they may act as if each had to order the winding up according to its own laws, without relation to the winding up going on elsewhere. This last mode of acting ought not to happen—ought not to be allowed to happen, as far as possible. That is to say, if the company is going into liquidation and proceedings are taken in all jurisdictions to wind it up, the Courts ought to act in co-operation. The principles of co-operation ought to be settled. Provision should be made for the avoidance of conflicts.

1. 27 Ch. D. 225.

It may be said that there is no difference in the final result between several and separate winding up and one unified administration. If the assets in each jurisdiction are distributed by each Court to all the creditors, the result is not different from all the Courts acting in co-operation and distributing the total of the pooled assets to the same body of creditors. But it makes a difference to the convenience of the parties concerned.

Let us now take each case and see how it will work.

There is only one proceeding and it is in the state of incorporation. The Court of that State appoints a liquidator. In him are vested all the assets. He has to go and sue in all the jurisdictions. If before he goes any creditor takes steps to recover his money and seizes money according to local laws he acquires precedence over the foreign liquidator. The procedure for recovering debts due in the course of long and protracted suits is most inconvenient and cumbrous. While the creditors have the convenience of applying to one Court, they have the inconvenience of having to go a long way off to conduct proceedings. One has only to fancy the inconvenience of a New Zealander conducting proceedings in London or a Londoner having to prove in New Zealand or Australia or Canada.

Now let us take several administrations. The creditors must apply in each jurisdiction and, if need arose, to prove in each. The contributories may be pursued in each place. There may be conflict in the case particularly of persons who have property in both States. Creditors may be accepted in one but not in another jurisdiction. Or their proof may be accepted for different amounts. Contributories may be varied in the different Courts. Other difficulties and divergences may be conceived.

If they co-operate, and conflict is resolved by each court dealing with the body of creditors or contributories living within its jurisdiction and subject to its forensic laws, there is then machinery for compiling a common list of

creditors to whom equal distribution is due ; no creditor will be enabled or permitted to secure precedence by a scramble ; no contributory will escape and the summary procedure of liquidation will be quick and effective in each jurisdiction for the benefit of all the creditors.

The existing practice in such cases is only meagrely indicated in the reports. But I venture to suggest that the British Courts must have found co-operative administration very easy as the Courts have not been called on to resolve a conflict between the Courts or their liquidators.

Now I intend to set down the cases and the passages in the text books that have stated the practice hitherto adopted in this class of cases.

Hailsham's Edition of Halsbury's Laws of England has this passage in the volume on *Companies* at p. 871 in reference to Foreign Companies :

> " A foreign Company * * may be wound up as an unregistered Company under the Act of 1929. * * if it has a place of business and assets in England, and notwithstanding that it has been dissolved or ceased to exist as a Company under or by virtue of the laws of the Country under which it was incorporated * *.
>
> The jurisdiction of the Court to make a winding up order is unaffected by the fact that a liquidation has already commenced in the country of incorporation and in such cases the winding up in England will usually be conducted *as ancillary* to the liquidation in that country."

The cases cited in support of this last proposition are, In re *English, Scottish and Australian Chartered Bank*[1], In re *Matheson Brothers, Ltd.*[2], In re *Commercial Bank of South Australia*[3], In re *Federal Bank of Australia, Ltd.*[4], *North Australian Territory Co.* v. *Goldsborough, Mort & Co.*[5]

In re *Matheson Brothers, Ltd.*[2], laid down that a winding up could be ordered in England, even if there had been a winding up order in New Zealand.

1. (1893) 3 Ch. 385 (C.A.).
2. (1884) 27 Ch.D. 225.
3. (1886) 33 Ch.D. 174.
4. (1891) 62 L.J.Ch. 561.
5. (1889) 61 L.T. 716.

Why it is right and necessary to pass a winding up order in the case of a foreign company is considered in this case.

In re *Commercial Bank of South Australia*[1] followed in In re *Matheson Brothers, Ltd.*[2]

The actual point in the case of *The English, Scottish and Australian Chartered Bank*[3] was one of procedure for the reconstruction of a company whose place of incorporation was Australia.

In re *Federal Bank of Australia, Ltd.*,[4] is instructive. It was an Australian Company, being voluntarily wound up in Australia under the supervision of the Court. A creditor having applied to have the business wound up in England agreed that the manager in England should act as agent of the colonial liquidator on the undertaking of the company not to remove the English assets without the leave of the English Court and without giving notice to petitioner of any action which might be commenced against the company. The Court refused to accept the arrangement notwithstanding its safeguard of assets, but ordered compulsory winding up *limiting the power of the liquidator to the collection of English assets and the settling of the list of English creditors.* The Court of appeal maintained the order.

In the last of the cases Kay, J., upheld a voluntary winding up in England of an English company which had the bulk of its business in Australia on the ground that it was an English company and the Australian liquidation could only be ancillary to the English winding up.

Now for the actual words used.

In In re *Matheson Brothers, Ltd.*,[2] Kay, J., said :

"The mere existence of a winding up order made by a foreign court does not take away the right of the courts of this country to make a winding up order here."

1. 33 Ch. D. 174.
2. (1884) 27 Ch.D. 225.
3. (1893) 3 Ch. 385.
4. (1891) 62 L.J.Ch. 561.

"I am justified in taking steps to secure the English assets until I see that proceedings are taken in the New Zealand liquidation to make the English assets available to the English creditors *pari passu* with the creditors in New Zealand."

The English creditors had to recover 5,000 £ and the assets in England were 150£. In In re *Commercial Bank of South Australia*,[1] North, J., pointed out :

"The question is whether the English creditors ought to be left to recover their debts in Australia, their debts having been contracted here and *there being a large amount of assets here.*" (*Cf.* 27 Ch.D. where the assets were small.)

"I think the winding up here will be ancillary to the winding up in Australia, and if I have the control of the proceedings here, *I will take care that there shall be no conflict between the two courts* and I shall have regard to the *interests of all the creditors* and *all the contributories* * * * The liquidators ought *not to act without the special directions of the court* except for the purpose of getting in the English assets and *settling the list of English creditors.*"

In In re *English, Scottish and Australian Chartered Bank*[2], Vaughan Williams, J., said :

"One must bear in mind the principle upon which liquidations are conducted in different countries and in different courts, *of one concern.* One knows that where there is a liquidation of one concern, the general principle is—ascertain what is the domicile of the Company in liquidation ; let the court of the country of domicile act as *the principal Court* ; and let the other Courts act as *ancillary, as far as they can,* to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation—the desire to act as ancillary to the court where the main liquidation is going on—*will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation.*

"I am *bound to make provision for creditors in all parts of the world.*"

In In re *The Excess Land Mercantile Agency Co., Ltd.*,[3] North, J., observed :

"To a certain extent I treat the winding up here as ancillary to the winding up there but *not to such an extent as to make this court an agent for the Court in Queensland and I must investigate the matter as far as I can here.*"

1. (1886) 33 Ch.D. 174.
2. (1893) 3 Ch. 385.
3. 58 L.T. 878.

What we get out of these cases are (1) one Court is principal and the others are ancillary. The Court of domicile or the Court of incorporation is to be the principal Court; (2) The ancillary Courts are not mere agents but have to decide matters within their jurisdiction according to their own forensic laws.

The comment one may add is that the words, principal and ancillary, were perhaps unfortunate, as Mr. Justice Nokes of the Travancore High Court remarks in a recent judgment relating to the Travancore National Bank liquidation proceedings. Co-operation is there in those words but except in regard to dissolution which only one Court could order what difference that description makes in their powers it is difficult to know.

Lord Selborne cites with approval the words of an American jurist of repute:

> "I am yet to learn what possible difference it can make in the rights of parties before the Court, whether the administration be a principal or an ancillary administration." See *Ewing* v. *Orr-Ewing*[1].

Mr. Justice Maugham said that:

> " the effect of one winding up being ancillary to the principal winding up has not, I think, been much considered in our courts. This court no doubt holds that in the winding up here all creditors, whether British or foreign, who can prove their debts have equal rights; but it would seem that foreign courts do not always take the same view" In re *Vocalion (Foreign) Ltd.*[2]

As the ancillary Court is not an agent but a Court bound to administer according to forensic laws and as that function cannot be taken away from it as from a mere agent, their mutual relation is one of co-operation, each performing its own function within its own jurisdiction.

But as they co-operate finally it must involve each taking from the others the result of their several exercise of their respective jurisdictions.

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1. (1895) 10 A.C. 453 at 514. 2. (1932) 2 Ch.D. 196 at 207.

Mr. Justice North directs the ascertainment of the creditors within the jurisdiction ; that ascertainment must be of use in the mutual co-operation.

Mr. Justice North further says that the creditors and the contributories will be protected by him. He cannot do that except by determining who they are and seeing them recognised in the other places. In fact this consideration is mutual. Each determines in its own sphere and the determination is recognised in other jurisdictions.

Equality of distribution to all the creditors is the rule. So that the resources have to be dealt with, debts collected and contributories made to pay as far as necessary and the creditors ascertained for all jurisdictions by the co-operation of all the Courts ; and then the amount of dividend is determined. Each Court is vigilant to see that equal justice is done to those in its jurisdiction.

How in each case the co-operation was carried out in detail does not appear in any case. We have North, J., directing the liquidator not to do anything without consulting the Court. The same judgment implies that each Court is to respect the decision of the other Courts and no conflict should be allowed to arise.

No rules exist in England under the Companies Act as to this co-operation. But alongside of the Companies Act and the rules framed under it, this co-operation has gone on as required by international comity. The Act of 1929 introduced certain changes as the result of differences of judicial opinion as to whether a dissolution had or had not been effected by the Soviet Governments of Banks in Russia with a view to take up all Banking into the hands of the State. (See Halsbury's Laws of England, Hailsham's Edition, Companies, pp. 860-1 and cases cited therein.)

All difficulties now stand solved by legislation. The Act of 1929 provided for a winding up in England notwithstanding the dissolution of the Bank in the country of incorporation* ; and notwithstanding that the

* Ss. 337 and 338.

company was carrying on its business in England, without a branch through an agent.

And the remark of Mr. Justice Maugham in the case in (1932) 2 Ch.D. 207 was also in regard to Russia—that it did not recognise the duty of equal distribution. That comment does not take account of, or is a reflection on, the fundamental Soviet principle of recognizing no private property and the duty of taking over Banking as an exclusive concern of the State.

There are three kinds of relationship between different States. There are the independent Sovereign States. They have each their several interests. They have their several legislatures. Co-operation between them is a matter of treaty freely agreed to. Then there is the relation between Britain and the Dominions and Dependencies. The British Parliament can legislate for all of them. Till recently that right of legislation was absolute. Even now it is possible, subject to the consent of the dominions concerned. In the case of all countries other than the self-governing dominions, that power of legislation still exists. And yet in the matter of a law like Company Law there is not one legislation applicable to the whole Commonwealth or Empire. The Company Law as settled by Parliamentary legislation is adopted as a model for Indian Legislation, the Indian States take over this law *mutatis mutandis*, by legislation in due form. The result is not the same as one legislation applicable to the whole area. The laws are not the same but only similar. The law applicable in relation to each other is international law, not the same legislation, notwithstanding the verbal identity of the company legislation in the whole area. The British Company Law and the Company Law of New South Wales are substantially the same. But proceedings in British Courts are proceedings in a foreign Court to New South Wales. And *vice versa*. The same applies to the relations between England and Scotland. Except where legislation has provided for the co-operation of the English and Scotch Courts as if they were one country, their co-operation is the co-operation of

Courts foreign to each other. Until the passing of the Judgment Extension Acts, the judgment of one country can be carried into effect in the other country only by an action upon the judgment, in which case the judgment in regard to its validity is subjected to the tests of International Law. That England and Scotland should be foreign to each other is so well rooted in their history that even after legislative provision for co-operation between them in the matter of the winding up of companies the House of Lords held that a Scotch winding up was not to operate in England as if it were an English winding up and the consequences in England of a Scotch winding up proceeding are exactly those of a winding up in any foreign country.[1] Lord Macnaghten said that the provision for co-operation probably intended that the Scotch proceeding was to operate as an English proceeding in all respects but the words were insufficient to indicate that intention. The British Parliament then passed a law that a winding up in Scotland or England should have operation in the other country as if the proceeding had been in its own Courts.

International Law, then, is what governs the mutual relations of the various countries that compose the British Empire and Commonwealth. That is the English way of leaving regional concerns alone except when a specific trouble clamours for specific solution.

A third kind of relation is that between British India and Indian States. There is no common legislature for British India and Indian India. In this respect they are more like independent states than like the component parts of the British Empire. But suzerainty involves political subordination and that distinguishes the Indian States from independent Sovereign States. It requires no argument to maintain that the relation between the peoples of British India and the Indian States is indivisible or more intimate than the relation between British India and any part of the British Empire, and that, notwith-

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1. *Galbraith* v. *Grimshaw*, 1910 A. C. 508, *Cf.* 56 Mad. 405 P. C.

standing that the latter have a common legislature and the former have not. A co-operation between British India and the Indian States is not without precedent. In the matter of the execution of decrees there is provision that they should execute each other's decrees, subject to the consideration of their validity on principles of international law.

The suggestion here made is that there should be legislation in British India and the Indian States, so as to regulate their functions in the matter of the winding up of companies carrying on business in both areas.

The case that has given rise to the suggestions here made involves not merely the Indian Courts but Ceylon also. Co-operation between British India and the Indian States has precedents. Co-operation between British India and Ceylon is without precedent. Even the authority in England that deals with India is not the authority that deals with Ceylon. The Secretary of State for India is one person and the Secretary of State for the Colonies which include Ceylon is a different person. It is difficult though not impossible to secure legislation in England or in Ceylon to direct co-operation in the matter of the winding up. And a further curious fact that has been reported is that Colombo and Jaffna have not co-operated. The laws may be different but the winding up in Ceylon cannot be divided, if our ordinary notions have any application to Ceylon. One does not know that Jaffna and Colombo form separate units dealing with each other as foreign Courts, as English and Scotch Courts still do except in so far as statutory unification has been effected for limited purposes.

Colombo which cannot pay more than two annas to its creditors is willing to co-operate; but, we are told Jaffna can distribute between 12 to 14 annas and does not want to come into equal distribution.[1]

1. It is since learnt that Jaffna had distributed only 4 as. in the Rupee and co-operation between Colombo and Jaffna is now being moved in the Supreme Court.

Now I turn to another matter of some relevancy in connection with Companies. Bankruptcy and Liquidation have cardinal differences. There is a difference between individuals and Companies. Individuals are not the creations of a State and in their individual transaction do not sail under any authority from the State. Companies are artificial persons created by the State and derive their authority from the State. A company comes into existence by the provision for their registration and incorporation by State Laws. Its memorandum can only be altered in that State. Its capital may be reduced only there. Its final dissolution is also in accordance with the laws of the country of incorporation. The incorporated company receives recognition in other states in accordance with the laws of international comity.

Now we can gather up the threads and state what provisions are needed in the proposed legislation.

(1) Provision should be made for co-operation between all the courts.

(2) If one court is to be principal it must be the court of incorporation.

Note.—Change of domicile at choice is not for a corporation. An individual chooses. The personality of a company is a juristic creation. Incorporation gives it its status and puts it in the same position as an individual subject. The status is dependent on the laws of that country. Its sole and permanent domicile must be there. It is the fact that incorporation and dissolution and the status and capacity during life are all governed by the laws of the country of incorporation that makes a change of domicile impossible. Westlake says that if an English company carried on the whole of its business abroad, it may be still be wound up in England because it is an English company.

(3) If in a given case convenience demands that the liquidation should primarily be elsewhere than in the courts of the incorporating State, it should be agreed to by the courts or the States concerned.

Note.—*In re Matheson Brothers Ltd.*[1], was a case of comparatively small assets.

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1. 27 Ch.D. 225.

North Australian Territory Co. v. *Goldsborough Co.*,[1] involved a case of bulk of the assets being in Australia. Still the English court is principal because the Company was English.

(4) Each court must be enabled to decide and fix up the list of creditors and contributories within its area and the orders must be accepted by all the courts.

(5) If winding up goes on in one jurisdiction and calls are made by that jurisdiction, it must be made an order of court and enforced in other jurisdictions.

Note.—This perhaps will be done even now. *See* for an order of the kind between England and Scotland, In re *City of Glasgow Bank*[2]. As there is already provision for execution as between courts here, those sections may avail as in the case of execution of decrees.

Provision should be made for rule-making for the solution of conflicts by the courts or the Executive Governments.

This function is in part political as the question is whether the states should allow foreign Companies to do business and if so on what terms.

The existing provisions as to foreign companies are all for full information about foreign companies but not for protection in case of failure.

Companies cannot deposit enough monies in each area to answer local claims. Insurance companies accumulate and invest. They can be asked to have funds invested in each state. A company cannot hold its funds unused in its business. Banks have to invest in the most profitable places for their purposes. There are places of deposit and places of investment. Funds cannot be held up in deposit in each place so as to be available for its claims.

The above is intended to set down the considerations that suggest the urgent need for legislation. It is not written for lawyers only on a matter of legal interest to them but for lawyers and laymen on a matter of legislation which touches a growing sphere of public interest. It is drawn in rough and not rigorously with a view to assist actual legislation. Details may have to

1. 61 L.T. 716.

2. (1880) 14 Ch.D. 628.

be carefully considered and due provisions framed accordingly.

I may add as a sort of postscript that the British Parliament has provided for co-operation in bankruptcy Laws between the Bankruptcy Courts all over the British Commonwealth. And the words, principal and ancillary, I suspect, come from the nature of the co-operation in bankruptcy. S. 122 of the Bankruptcy Act of 1914 provides for that co-operation. A similar provision in the Company Law as to winding up may be sufficient to produce the result here desired. But as stated already there are differences between bankruptcy and winding up. It is these differences that make the use of the word *ancillary* not quite appropriate. The action of the ancillary court in bankruptcy is always at the request of the principal court and limited to the matter contained in the request. But the adoption of the decision of the ancillary court is involved in the request and compliance. In the winding up are involved several jurisdictions and the duty of protection to local interests which impose on each jurisdiction the duty of judicial determination without request from a principal court which in bankruptcy is the sole administering authority. That is why the separate parts of a winding up of *one concern* have to be enabled to attain the result of unitary administration. And we have here Indian States also which cannot be reached by Parliamentary or Indian Legislation and therefore parallel legislation in British India and Indian India is necessary.

THE JUDGE

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It is often ignored that members of the judiciary are equally members of the legal profession. Where the judges are chosen wholly from the practising Bar, this identity of their vocation cannot be easily lost sight of. The judge and the practitioner discharge complementary functions in building up the edifice of Justice. It is a mere matter of division of duties to secure economy of labour and efficiency of result.

Different causes might lead to this untrue assumption of a distinction and differentiation between the judge and the practitioner, as if they were alien to each other. The constitution of the judiciary may have a bearing; the continued exclusiveness of conduct of members of the judiciary and members of the Bar may also have its influence. But whatever the causes of this misunderstanding, the unity of purpose of the two sections of the legal profession, the Bench and the Bar, deserves to be recognised, encouraged and cherished. A judge, on his appointment, does not cease to be a member of the legal profession and we may add that one, not a member of the legal profession, who is made a judge, becomes *ipso facto* adopted into it. The efficient administration of justice calls for a full recognition of this identity.

Elsewhere, I have endeavoured to enunciate the several duties that counsel owes to the court and the presiding judge. In truth, many of the obligations which a practitioner owes to his client or to a brother practi-

tioner or to the community of the profession or to the public, arise in a general way, out of the duties that he owes to the tribunal. For, a practitioner, *qua* practitioner, has no existence apart from his relation to the Court of which he is an officer, adviser and helper.

This necessary interrelation between the practitioner and the judge involves a reciprocal obligation and it may therefore be permissible for a practitioner to canvass the expectations that he has of the Court and the judge to whom he owes so much. He is entitled to consider what kind of conduct from the judge and what measure and sort of co-operation from the Court would enable him, from his point of view, to discharge best the duties of his office.

On many matters, it may not be possible to state positively and categorically what a judge should be or should do; but it is possible to enunciate what the advocate would not wish the judge to be or to do in the interests of the Bar and in the best interests of the administration of justice, in which both are engaged.

I have referred to the primary duty of counsel not to be uncivil or rude or disrespectful in any form or manner towards the judge. It is not too much to say that this duty of counsel calls for a reciprocal duty on the part of the Court not to disregard the privileges of the Bar. While judges ought to be insistent upon the dignity of their office and upon a deferential courtesy in speech and manner and should properly enforce it, they should not expect conduct tantamount to servility, or themselves be haughty and overbearing in manners, or impatient and inconsiderate in their conduct, or rude and unapproachable in their relations with the Bar. As Mr. Justice McCardie said, it is the sense of independence of the Bar that deepens and confirms the instinct for fearless decision in the judge. So even where a practitioner's conduct calls for chastisement from the Court, it is consistent with its own dignity to make the admonition in a dignified mannner. Lord Bacon has said, "There is due to the

public a civil reprehension of advocate where there appeareth cunning counsel, slight information, indiscreet pressing, or an overbold offence."

Some judicial officers, particularly in the mofussil, suffer from an obsession that easy relations with members of the Bar are liable to be misunderstood and might even derogate from their own dignity. The consequence is that they shut themselves up in seclusion and are the worse for it from every point of view. I believe they suffer mentally, morally and physically and lose intellectual vigour, moral equipoise and physical stamina. They would not move on easy terms with a member of the Bar who practises in their court; they avoid all kinds of social contact generally and where they attend any formal function they cannot shed the consciousness of their judical office and feel offended if the same form or manner of courtesy that they are accustomed to in court is not shown to them at the social gathering as well. This enforced exclusiveness on the part of the judge, I should say, has a deleterious effect even on the administration of justice. No judge need suppose that practitioners are as a class dangerous to move with or are so far inferior to him in status that he should keep at a distance from them. Learned judges of this Court have shown by their example, how a judge of the highest court in the land can move on equal terms with the members of the Bar outside Court and yet maintain the dignity of his office and enforce discipline inside Court, even in relation to persons accustomed to move on the most familiar and intimate terms with him. Free and easy behaviour with the practitioners generally is bound to elevate the judge, make his work in court easier and improve the tone of his administration. Nor need any judge of an inferior court believe that judges of the superior court view such conduct with disfavour or lend ear to hasty and ill-considered accusations which ignorant persons may make at the initial stage. No judge, not even the best, can properly or fully discharge his functions without the willing and genial

co-operation of the Bar, which is called forth by equal social behaviour. While the power and authority behind the judge should not be lost sight of, they should not be brought to the forefront at every stage to hold *in terrorem*. Love wins more than fear ever does.

It is an everyday experience that judges look with disfavour upon interruptions from the Bar. They dislike a member of the Bar interrupting the argument of the opposing counsel and call him to order, where the interruption was not warranted. Interruption of the judge when he speaks, is properly considered intolerable and I have known cases where judges have sternly refused to complete what they intended to say. It is not the duty of judges to speak and when they speak at all, they speak to help counsel in argument, to clear up a difficulty or to elucidate a complex situation. But should the attitude of the Bar to interruption from the Bench be of a similar character?

Interruptions of arguments from the Bench may be of various types. Questioning with a view to elucidation or to further argument of a position ought to be welcome to everybody. No one, except the person to whom an interruption of any kind would mean that the line of his argument is cut off, can resent such voluntary assistance from the presiding judge who, after all, is the person that has to be convinced by the argument.

But there are other judges who adopt the Socratic method, ply the practitioner with questions and allow themselves to be counter-questioned by the practitioner till either the practitioner confesses defeat or the judge feels convinced that the position taken by the advocate is sound. This kind of catechism happens only, in cases where the judge prepares the brief at home as much as the practitioner does himself. Let me illustrate this with an instance in which I was personally concerned.

It was a second appeal, in which I appeared for the appellant, and counsel on the opposite side was engaged elsewhere when the case was called. So a request was

made to the Court to pass over the case for a while. Thereupon the judge remarked, "Is the respondent anxious to be heard in this case? Mr. K. let us hear you." Then I respectfully submitted that to be fair to my learned friend on the opposite side, it was better if my arguments were heard after he should arrive, for I said, I believed that I would be able to show that there was very much more in my case than what His Lordship *prima facie* thought there was in it. Then the learned judge adjourned it till counsel on the other side should arrive on the scene. Then what was it that happened when the case was taken up? It was a tussle, a quarrel, you may call it a fight between us, each questioning the other, each exemplifying the absurd consequences of the position taken by the other. If we were not on different levels, one may compare it to a discussion between an Adwaiti and a Visishtadwaiti. This went on for two hours and more and the judgment which was pronounced without calling upon the respondent was to the effect: "For reasons orally stated by me during the discussions at the Bar, the second appeal is dismissed with costs." On my part, there was nothing to be dissatisfied with. It was an intellectual treat. But was I the only person to be satisfied?

There can well be difference of opinion on the usefulness of such a method. Its propriety may not be accepted by many. For one thing, it converts the court-house into a debating forum. It leaves little room for cool and collected thinking. On the whole, though, with competent judges, justice may not fail in many cases, there may not be the residuum of satisfaction that justice has been reached. In any event, the client will not have the satisfaction that his cause had been heard fully and satisfactorily. Even when our arguments are calmly and patiently heard, how often has not a practitioner made an introspection of himself, wondering whether he had said everything that could be said, discovering to his dismay that he had omitted a possible aspect and then seeking to find laboured satisfaction in the thought that if he had put

forward that position, the opposite side would have met it with such other answer and that the result would not have been different. Which practitioner, has not, at one time or another, passed through mental agony of this kind?

Secondly it is a definite handicap to a junior practitioner, however able, who is not accustomed to this catechismal method, to present all his arguments, though he would find himself greatly helped by a limited questioning from the Bench. Interruption or questioning within limits should always be welcome, because they indicate the trend of thought of the judge and the points to which it is of special importance that the practitioner should direct his argument. A Master of the Rolls, who afterwards became the Lord Chief Justice of England, said, "The task of the Judge is difficult in observing the mid-course between the cross-examining spirit which incessantly interrupts counsel and the absolute silence which refrains from asking a question which might serve to elucidate a difficulty." An interruption that assists an argument has to be distinguished from one that destroys it.

Would counsel prefer a judge who sits absolutely silent and does not indicate any kind of reaction to the arguments proceeding before him? I think that the unanimous opinion of the Bar—barring the very few who mechanically recite arguments got up by rote—will be against it. They would prefer to be lightly interrupted and in any event to be given an indication of the judge's attitude. For, nothing is more difficult than to argue a case before a court whose taciturnity or stolidity makes it impossible for counsel to know whether his argument is appreciated or even understood—whether the court is entirely with him or wholly against him. Even if the only alternatives were ensuring absolute silence and immobility on the one side and brooking frequent and even troublesome interruptions on the other, I should think that most counsel would choose the latter.

I well remember a late learned judge of this court who was of the former type. He would not look at the

arguing practitioner but be looking all the time this side or that. He would be making a research of his own, and drawing conclusions on his own method. For aught one can say, he might be looking at p. 50 when you are referring to page 5 and the only words that he would utter during arguments and that, in a gruff tone and unsympathetic manner, would be "Have you finished?", with the consequence that the arguing counsel would begin to trot out his points again, in the belief that he had produced no favourable impression. On the appellant resuming his seat, the respondent would be called and he, in his turn, would pile up arguments in a frenzy in the suspicion that the judge may be in favour of the appellant. This method might give a training to counsel to judge between the relative values of points that arise in a case and to collect all his arguments and address them without omission. But no counsel would like to be placed in that situation.

Then there is the question whether judges should study the papers at home before they hear counsel. No one can object to a judge acquainting himself sufficiently with the facts of the litigation to follow the arguments with interest and easier appreciation, just in the same way as a judge can lawfully make a personal local inspection to understand the facts and the evidence in their proper bearing. But the evil is that the tendency might develop into a habit of forming conclusions in some rough form at least, before hearing counsel. There are judges who study the papers in detail and with care, and confront counsel in their arguments with materials of which even the other side may not realise the force. And a judge's point has always a hundred *per cent* value. The better opinion seems to be that this kind of preparation of a case by a judge does not lead to sound administration of justice. Where the court that hears the case is composed of a Bench of two or more judges, no useful purpose is gained by a discussion over the head of the other judge, who may not only be not interested in it but perhaps is annoyed with it, when his opinion has equally to govern

the ultimate decision. No judge need aspire to vindicate that he is abler than counsel that appear in the case. Judges are after all men and when unintentionally scope is afforded for the ego to assert itself, it is not easy afterwards to control it. It is also excusable that judges should entertain an exaggerated idea of the importance attaching to their position and of the value of their opinions. The ideal has therefore been stated in the form that the most eminent characteristics of a judge are—the realisation first of " the duty of patience " and second of " the high obligation of courtesy and kindliness." Among the rules that Lord Justice Fry set for himself to follow was one which may well be an inspiration to every judge ; and that was : " I must remember to give a benignant and receptive listening to each side and when hearing young counsel, I must remember how great the pleasure a kind word from the Bench has been to me in former years." Lord Bacon says " Patience and gravity of hearing is an essential part of justice and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel, too short, or to prevent information by questions though pertinent. The parts of the judge in hearing are four : to direct the evidence ; to moderate length, repetition or impertinency of speech ; to recapitulate, select and collate the material points of that which hath been said ; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory of willingness to speak or of impatience to hear,or of shortness of memory, or of want of a staid and equal attention." He adds that " it is generally better that the judge should err on the side of indulgence in this matter than that he should endeavour to hold the reins too tightly." After all, " the administration of justice is necessarily but an approximation towards that ultimate and absolute justice which may come with the millennium, but never before."